Petition

81-1684

No. ———

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Plaintiffs-Petitioners,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether 2 U.S.C. § 441b authorizes corporations to use employment-related pressures upon their career employees to obtain donations to their corporate federal election campaign funds.*

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* In addition to the International Association of Machinists and Aerospace Workers, the following parties appeared below as plaintiffs-appellants: William W. Winpisinger, Judy Reardon, Rebecca J. Ward, Anne S. Morrison, Alan B. Morrison, and Eugene Glover. In addition to the Federal Election Commission, Robert O. Tiernan appeared below as defendant-appellee in his capacity as Chairman of the Commission.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The International Association of Machinists and Aerospace Workers, *et al.*, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The Court of Appeals did not issue an opinion; its summary order of affirmance appears as Appendix A. The opinion of the District Court is not reported; it appears, together with the judgment, in Appendix B. The Federal Election Commission order dismissing petitioners' administrative complaint appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals affirming the decision of the District Court was entered on October 26, 1981. On December 15, 1981, Chief Justice Burger signed an order extending the time for filing a Petition for Writ of Certiorari to and including March 11, 1982. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant Federal Election Campaign Act provisions, 2 U.S.C. §§ 437g and 441b, appear as Appendix D.

STATEMENT

This case concerns provisions of the Federal Election Campaign Act which authorize corporations to create political action committees (PACs) and to solicit their employees for donations to those PACs which are then used by the corporation to make contributions and expenditures in federal election campaigns (2 U.S.C. § 441b(b)(2)). In 1979, a number of individuals joined with the International Association of Machinists in filing with the Federal Election Commission a sworn complaint (JA 6-100).[1] The complaint asserts that major American corporations are operating political action committees with employee donations that are not genuinely free, and which derive from employment pressures exerted by the corporations. The subject of plaintiffs' FEC complaint is the employee solicitation practices of eleven corporate PACs, including ten of the largest in the nation.

Plaintiffs' sworn administrative complaint shows that as a result of the coercive methods which the corporations use to solicit their senior employees the funds donated by such employees flow from the employment relationship, so that when given to federal candidates such funds constitute contributions by the corporation in a federal election

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[1] Joint Appendix filed with the United States Court of Appeals for the District of Columbia Circuit, hereinafter "JA".

which are forbidden by 2 U.S.C. § 441b(a) (JA 21-25, 38-41). The complaint to the FEC asserts that if the statute is construed to permit such corporate solicitation practices, then the Federal Election Campaign Act (FECA) violates constitutional guarantees (JA 42-44). The FEC, however, dismissed plaintiffs' documented complaint without investigation and without even a nod to this Court's interdiction of PAC payments "solicited in circumstances inherently coercive" in *Pipefitters Local 562* v. *United States*, 407 U.S. 385, 413 (1972), or to the serious constitutional doubts which arise if the statute authorizes employers to exact political tribute from their employees.

The complaining parties then brought suit in United States District Court, asserting statutory violations under 2 U.S.C. § 437g and raising constitutional objections to FECA under 2 U.S.C. § 437h if it is construed to permit the corporate practices which they challenge (JA 148-56). In an opinion of December 16, 1980, the District Court rejected plaintiffs' claim that their FEC complaint cites corporate conduct which violates FECA and requires action by the Commission (*infra*, Appendix B). On October 26, 1981, the Court of Appeals affirmed without opinion.[2]

1. Applicable Federal Law, 1907-1976

Corporate political contributions were unregulated by federal law until 1907 when, alarmed at the political consequences of massive corporate donations in federal election campaigns, Congress outlawed any contribution by a

[2] The District Court, however, recognized that major constitutional issues arise from its agreement with the FEC's construction of the statute. Accordingly, in the same opinion the Court ruled that under section 437h of FECA it would certify three constitutional issues for the Court of Appeals' *en banc* resolution. On June 3, 1981 the District Court certified the 437h proceedings to the *en banc* Court of Appeals. The constitutional issues are *sub judice* below, upon briefing and arguments completed in 1981 (No. 81-1664 below).

corporation in connection with a federal election.[3] Subsequent experience proved that the ban on contributions and (as later enlarged) on expenditures in federal elections had limited practical effect. The investigations by Senator Gore's subcommittee in the 1950s showed that a massive imbalance remained in the funding of federal elections, an imbalance favoring corporate interests. The Gore Committee's report (*1956 General Elections Campaigns*, Report of Subcommittee on Privileges and Elections, 94th Cong., 1st Sess. (1957), p. 3) found "heavy campaign expenditures by persons affiliated with big business and large vested interests" and concluded (p. 5) that the "findings of the subcommittee as set out in this report poignantly demonstrated the need for effective limitations on the amount of individual contributions."

Responsive to these concerns, in 1971 Congress imposed dollar limitations on individual contributions in federal elections (2 U.S.C. § 441a). At the same time, it refined the ban on corporate contributions and expenditures in connection with federal elections (18 U.S.C. § 610), providing detailed definitions of "contribution" and "expenditure" (2 U.S.C. § 441(b)(2)). Finally, it approved the establishment by corporations for federal election use of "separate segregated funds, to be authorized for political purposes" (2 U.S.C. § 441b(b)(2)(C)) now known generally as "Political Action Committees." Congress contemplated in 1971 that just as labor unions had been soliciting their members, corporations might solicit their stockholders for voluntary political contributions (see 117 Cong. Rec. H. 43,381). In Section 441(b)(3)(A) it underscored the voluntary character of such contributions,

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[3] In 1948 the prohibition was re-enacted as 18 U.S.C. § 610. The 1971 Federal Elections Campaign Act refined 18 U.S.C. § 610, and the 1976 FECA amendments recodified the provision as 2 U.S.C. § 441b. For a complete history of the ban, see *United States* v. *United Automobile Workers*, 352 U.S. 567, 570-584 (1957). Unions were covered for the first time in 1943 and were included in the statutory ban adopted by the 1947 Taft Hartley Act.

by banning solicitation using "physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal."

In 1975, the Federal Elections Commission issued its divided *SUNPAC* Advisory Opinion (A.O. 1975-23) approving corporate solicitation for contributions to the company's PAC not only of stockholders but also of corporate employees. Following this unprecedented FEC opinion, there was an immediate and rapid proliferation of corporate PACs and within one year their number increased from 139 to 433 (I 1303).[4] In 1976 Congress expressed concern about the burgeoning phenomenon of corporate PACs operating with employee contributions, noting that corporate solicitation of employees "creates extraordinary pressure and undue political potential for coercion" (remarks of Senator Cannon, 122 Cong. Rec. S 3,518 (March 16, 1976)). Specific restrictions were placed on employee solicitations; under section 441b(b)(4)(B), adopted as part of the 1976 FECA amendments, most employees may be solicited by their employer only twice a year by mail, and then only under conditions that ensure anonymity. However, employees within the category "executive and administrative personnel" may be solicited by the corporation without such restrictions (2 U.S.C. § 441b(b)(2)(A)); their solicitation is the subject of this action.

2. The Complaint to the FEC

In the wake of the *SUNPAC* ruling and the 1976 amendments there has been astronomical growth in corporate PACs. The number of such PACs has increased from only 139 in 1975 to 1,204 in December 1980—an increase of more than 750% (I 1303). Similarly, corporate PAC treasuries have skyrocketed—from $5.8 million in 1976 to $34 million in the 1979-1980 campaign

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[4] Certain FEC reports and materials elicited in discovery have been incorporated into the record in the District Court which is before the Court of Appeals in No. 81-1664, and are cited herein by the item numbers (I——) assigned in the District Court.

cycle—an increase of more than 400% in only 4 years (I 1201, 1302, 1304).[5] Alerted by the remarkable proliferation of corporate PACs, plaintiffs initiated research which culminated in a documented sworn complaint to the FEC presenting detailed evidence concerning solicitations by major corporate PACs.

Section 437g(a)(1) of FECA provides that "any person" who believes a violation of the Act has occurred may file a sworn complaint with the FEC. Section 437g(a) also specifies the procedures for FEC investigation and action on a proper sworn complaint. On October 9, 1979, plaintiffs filed a sworn complaint with the Federal Election Commission (JA 6-100), documenting conduct by ten of the nation's largest corporate PACs and one smaller PAC added for comparison. The complaint set forth three chief claims. First, it described specific means by which the eleven corporations solicit contributions to their PACs from executive and administrative employees (JA 21-25). Second, it contended that as a result of the solicitation methods being used, employees are donating to the corporate PAC not from free choice but because of the employment relationship, and that the use of their donations by the corporation for Congressional campaign contributions therefore violates section 441b, which forbids direct or indirect corporate contributions in a federal election (JA 25-35). Finally, it asserted that if the corporate conduct described is deemed permissible under federal law, then the FECA violates the First Amendment rights of corporate employees (JA 9-10, 42-44).

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[5] Despite this explosive growth in only a few short years, the prognosis for the future is many times greater. Overall corporate capacity to amass PAC treasuries from their employees has barely been tapped. More than two-thirds of *Fortune's* 1,000 leading industrial corporations do not yet have corporate PACs, and the 1,204 corporate PAC's now active represent less than 5% of the 24,000 American corporations having assets of over $10 million (I 1604, 1605, 1609).

Plaintiffs' verified presentation to the Commission included a company-by-company analysis (JA 28-37, 52-100), and a summary for all eleven corporations which detailed certain practices common to most of them (JA 25-28).[6] The complaint first focused on the targets of corporate solicitations—vulnerable career employees, including not only top executives but also such middle management as company engineers and staff attorneys. It was emphasized that for career workers promotion is crucial and that they usually have neither contractual job protection nor contractual assurance of promotion (JA 22-23). The complaint noted the inequality between the employer who asks his career employee for a financial donation and the employee asked to give; concern for promotion, for employer good-will, and considerations of loyalty or obligation all come into play when an employer turns to his employee for financial help (JA 38-39). It was noted that inherent employment pressures to donate in such circumstances are magnified by the absence of anonymity assurances to the solicited employee (JA 23). Under the federal statute the donor's name is on file in the public record if he gives above a threshold level ($100 in 1978, $200 since); moreover, the corporations do not even assure internal anonymity for the solicited employee's donation decision (JA. 23). Thus, an employee is aware that his employer can know whether he has donated. Under these circumstances, it was emphasized, any request for an employee's donation to the employer's political war chest is pregnant with the potential for coercion (JA 38-40).

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[6] Almost all the facts stated in plaintiffs' administrative complaint were taken from the public record—principally from the filings by the corporations with the Federal Election Commission of certain required information about their receipts and expenditures. While corporations are not required to report the solicitation methods they use to the FEC, some information about them was available from published sources. In addition, some of the corporations replied to inquiries by Tyke Research Associates in 1979 concerning the operation of their PACs.

Turning to the means of solicitation which the corporations are using, plaintiffs' FEC complaint described a variety of solicitation methods which further tend to erode the employee's free choice, to constrain his positive response to the employer's request for his money, and to render a resulting donation by the employee the product of the employment relationship. The first crucial element is that employers candidly ask for PAC donations to further the corporation's own business interests; examples were cited from the written solicitation materials used by the corporations in those instances where they were available (JA 22, n.8). The companies not only ask employees to donate to the PAC in aid of the employer's business interests, but they reinforce such requests by personal solicitations and by supervisory involvement in the solicitation process (JA 24). It was also noted that employees are assembled in PAC solicitation meetings, where peer-group pressure is brought to bear (JA 24).

Added to these solicitations pressures is the involvement of heads of departments and other supervisors. Two examples given in the FEC complaint involved Dart Industries and Eaton Corporation. Justin Dart, the company Chairman, publicly stated that where employees have not contributed to the PAC they are called up and "get a sell" (JA 24, 53). Similarly, Eaton conceded that "face-to-face meetings" with managers are its "most effective" PAC solicitation method (JA 24, 57). The complaint pointed out that such involvement of management and supervisors in the solicitation of career employees exerts pressures that tend to render resulting contributions a product of the employment relationship rather than free choice acts (JA 28).

A final set of facts plaintiffs placed before the Commission involve amounts of PAC contributions and rates of participation by corporate employees under the solicita-

tion circumstances described. Unlike election donations by the general population—which tend to be made only in election years and at modest dollar levels—the complaint pointed out that corporate PACs are receiving annual donations from their administrative and executive employees averaging between $116 and $338, and that the average annual contribution by senior employees at some companies is as high as $1,000 or $2,000 (JA 26,36). Even more important, it was pointed out that the rates of PAC participation are quite unprecedented (JA 25-26); in 1978 of 80 million American households only 145,374 contributed $100 or more to Congressional candidates, a participation rate of less than 0.2%; if only households earning over $20,000 annually are considered, still less than 1% made such contributions; and even considering only households earning over $50,000, the participation rate would still have been less than 7% (I 1606, 1570). By contrast, corporations are receiving annual PAC contributions of $100 or more from 60%, 70%, and even 80% of their employees in the upper echelons (JA 27). These figures, it was urged, confirm that senior corporate employees are responding to solicitations not from desire to participate in politics, but because of their special vulnerability to their employers' demands for help and because of the employment-related pressures brought to bear upon them by the solicitation methods which the corporations use (JA 41).

Despite this compelling verified presentation in plaintiffs' sworn complaint, the Commission on December 13, 1979 dismissed plaintiffs' complaint without an investigation (JA 147). Although no basis was stated for its action, a memorandum submitted to the Commission by its General Counsel a week before the FEC voted essentially demurs to the complaint filed by plaintiffs, concluding that the corporate practices detailed in plaintiffs' sworn complaint are nowhere expressly forbidden by FECA and are therefore authorized by the statute (JA 133-34, 135).

3. Proceedings Below

After the Commission rejected their complaint without investigation, plaintiffs filed this action. Under 2 U.S.C. § 437g, they asked that the Commission be required to investigate their complaint and act thereon (JA 153-54). In addition, under 2 U.S.C. § 437h, constitutional claims were presented challenging the validity of the statute as construed by the Commission (JA 154).

In the briefs and arguments before the District Court the Commission adhered to its demurrer approach, arguing that the conduct of the corporations detailed in plaintiffs' complaint is not expressly forbidden by the statute. In the Commission's view, the statute prohibits only the use of employment sanctions against an employee for refusing to donate to a corporate political fund (*see* transcript of District Court proceedings, July 18, 1980, p. 44). On December 16, 1980, the District Court issued an opinion upholding the Commission's refusal to investigate the sworn complaint (*infra*, Appendix B). It stated that "[s]itting as a trier of fact, the Court might well draw the conclusions plaintiffs advance," but the Court ruled it could not substitute its own judgment for that of the FEC (*infra*, 13a). Noting that the FEC's construction "limits Section 441b(b)(3) to proscribing only those acts described by the statutory language," the lower court found that reading "consistent with the legislative history."

After the District Court dismissed plaintiffs' complaint seeking an FEC investigation and remedial action, in view of the remaining constitutional challenge under Section 437h it entered an order on January 8, 1981, providing for discovery of facts concerning four of the eleven corporations which are the subject of plaintiffs' FEC complaint, including Dart Industries, Inc., Eaton Corporation, United Technologies Corporation, and Winn-Dixie Stores, Inc. A

voluntary and expedited discovery procedure elicited materials from these four corporations which, along with certain publicly available materials, were incorporated in an Agreement by the Parties signed by plaintiffs and the FEC on April 27, 1980. The data on these corporations further confirm plaintiffs' principal allegations to the Commission regarding PAC solicitations by the corporations: that employees are candidly told to contribute to aid the employer's business interests; that employees are called into solicitation meetings by management; that the employees' supervisors and department-heads are involved in their solicitation; and that an unprecedented proportion of the solicited individuals make substantial annual donations to their employer's political fund.

Dart Industries, Inc., and DARTPAC

Employees are pressured for donations to help their employer.—The DARTPAC Statement of Principles announces that political action is an employment responsibility of Dart officials, explaining that "as employees of a company . . . we have an individual responsibility to actively engage in the political process for the purpose of preserving the free enterprise system." This basic document, which is attached to written employee solicitations for PAC contributions, emphasizes that "DARTPAC will be an active voice in representing the interests of you, your company, and the system within which we do business." Similarly, the most recent written solicitation states that DARTPAC helps elect those who "support business and believe in the free market system," and a 1978 report to DARTPAC donors explains that, although corporate funds can't be given in a federal election, "the corporation can get involved through money donated to its PAC . . . [f]ormation of a PAC shows those who would seek federal office that we are a concerned corporation . . . and should be reckoned with" (I 102, 106, 115).

Employees are called together in group solicitation meetings.—Top Dart employees are summoned to periodic meetings, which are held on work premises, during working hours, and with supervisors of solicited employees in attendance. DARTPAC literature and contribution forms are distributed at these meetings, and DARTPAC officials make a presentation linking the functions and activities of the corporate Public Affairs Department with an explanation of the role and philosophy of DARTPAC (I 515(r), 515(z), 517). A memorandum written by DARTPAC Treasurer Malloch, entitled "Political Action Committee (PAC) Solicitation" (I 103), details the company's solicitation philosophy and methods, and concludes:

> "At Dart, we encourage discussion of the issues, discussion of politicians, discussion of our PAC, discussion of the people our PAC supports. We create an atmosphere where political involvement is a positive value. In short, we create a need for an individual to become a political activist through our PAC. Certainly some will become contributors, not because of the purpose of the PAC, but because they feel a need to be part of the group. However, our corporation creates a situation that stimulates a need for political involvement, this makes a successful PAC."

Senior Dart officials resolicit employees who have declined to contribute.—In response to a 1979 inquiry by Tyke Research Associates about methods of solicitation, DARTPAC stated that: "All techniques are used, personal contact is the most effective." One of these personal contact techniques is supervisor pressure on non-contributing employees. Dart employees initially receive written requests to contribute to DARTPAC from Dart Chairman and Chief Executive Officer Justin Dart, and from Dart President Tom Mullany. Employees who respond with contributions in amounts smaller than those specified in the DARTPAC donation guidelines (as much

as 1% of an employee's total compensation), receive letters that remind them that their contributions are being compared to their salaries—a 1978 letter from Dart and Mullaney states: "You know, of course, your position here is not affected whether or not you participate in PAC. However, we feel it important to do our level best to sell you on the merit of participating fully in our PAC. We hope that in this year's drive you will increase your contribution to the level of the suggested guidelines, or higher" (I 108(a)-108(c), 112(b), 117, 118, 120, 515(u)).[7]

Such written solicitations are reinforced by face-to-face pressure. The company confirms Justin Dart's public statement that individual employees who "don't give, get a sell." A sample instruction from Justin Dart tells supervisory personnel that "[w]e are looking for you to present the case to your people in your own way." Similarly, an attachment to a memorandum written by the DARTPAC Treasurer suggests "that you emphasize the following points in your discussions with pertinent members of your staff," and lists five discussion points regarding DARTPAC contributions concluding with "[p]lease think of this as an investment in your future and that of your kids rather than as a contribution." Finally, some non-

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[7] The By Laws of DARTPAC expressly provide that its "officers . . . shall not be required to maintain the anonymity of any contributor" (I 101). DARTPAC officers and the highest corporate officials have access to the contribution information and use it to target employees for additional written and oral solicitations (I 515(k), 515(p), 515(v), 517). These solicitations contain no assurance that the employee's contribution or failure to contribute will be anonymous (I 515(w)). One such follow-up solicitation reminds employees that company officials know whether they give to the PAC: "In reviewing our records, we find that your last contribution to DARTPAC was made in ————————. Hopefully, you will want to make another *voluntary* contribution during the calendar year of 1979" (I 112(f), emphasis in original, see I 108(c) and 112(c)).

contributors are personally called upon to give by Chairman Justin Dart or by DARTPAC head J. Steven Rhodes (I 104, 118, 515(c), 515(p), 515(t), 517).

Employee donations to DARTPAC.—Sixty-three percent of Dart Division and Subsidiary Presidents contributed to DARTPAC in 1979, while approximately 27% of Division and Subsidiary Vice Presidents and Executive Vice Presidents contributed to the PAC. Among senior Dart Industries executives approximately 82% contributed to the PAC in 1978 and among the officers participation rates run as high as 95% in election years. Between 80% and 90% of employees making contributions to DARTPAC do so in amounts of $100 or more; in 1980 the average contribution to DARTPAC was $1,030, and among senior employees the average was $1,435 (I 121, 515(d), 515(h), 515(x), 517).

Eaton Corporation and the Eaton Public Policy Association

Employees are pressured to donate to EPPA to help their employer.—In written solicitations of the 610 highest Eaton employees, the corporation's Chairman asks them to contribute to the PAC on the following basis (I 203):

> "Simply stated, the problem is that there are too few members of Congress who understand or are committed to the American business system. The country, Eaton, and each Eaton employee can prosper only if we protect and nourish our institutions of economic and political freedom. I do not believe that can be done unless a larger number of Congressmen come to understand the needs of business, and the need for restraint in both government regulations and government expenditures."

A pamphlet describing the PAC announces a policy of contributing "solely to candidates who have demonstrated their understanding of business needs" (I 206(a)). Another PAC solicitation letter (I 204) discusses two legis-

lative proposals which would "adversely affect" the employer's earnings:

> "The DISC [Domestic International Sales Corporation] program, which we fought so hard to keep in 1975 and 1976, is again targeted [by the Carter Administration] for elimination. Deferral of taxes on overseas income is projected as another business loser. As you know, elimination of either program would adversely affect Eaton's profits."

Employees are called together and solicited for PAC contributions at group meetings.—Since 1977, Eaton has solicited employee contributions to its PAC through some 38 separate group meetings held on company premises, often during working hours, and with employees of varying levels of responsibility in attendance including officials superior in rank to other attending employees (I 519(d), 519(f), 519(h), 520(e)-520(m), 520(Exhibit B)). Senior employees are called to these meetings, which last one to two hours, by the highest corporate official at their facility or by their department head (*id.*). The meetings often include an audio-visual presentation telling employees to "get into politics or get out of business," and to "know what legislation is being proposed and how it might affect you and your company." The message states that although "the extent of personal involvement varies . . . for men and women with executive and operating responsibilities there is a minimum program of involvement that should be taken to protect . . . the future of your company and your family," and concludes by telling employees to "contribute money to your legal and financial limits." In response to a 1979 questionnaire from Tyke Research Associates, Eaton reported that "face-to-face meetings with our managers were the most effective method of solicitation" (I 212, pp. 2-4, 224).

Senior Eaton officials solicit donations to EPPA and resolicit employees who decline to contribute.—The Chairman and Chief Executive Officer of Eaton, as well as its

President, send personal PAC solicitation letters to corporate employees. In these materials, senior employees are also told that the highest corporate officials "hope all Eaton managers will join the Association" and "very much want everyone's participation." Eaton employees who did not contribute have received a resolicitation letter from the Corporation Chairman, which states, "In the summer of 1977, you had the opportunity, as did most of our U.S. Managers who are on Incentive Compensation, to visit with some of the members of the Public Affairs Staff to discuss Eaton's approach to public policy and how EPPA fits into it. Although more than half of those managers have chosen to become EPPA members, you are among those who have not yet joined." As a result of this resolicitation, an additional 15% of the employees who had previously declined to contribute gave to the PAC (I 203, 204, 205, 206(a), 213, 214, 217, 220, 520(p)).

Employee donations to EPPA.—In 1977, of the 610 corporate employees who received written PAC solicitations 531 were invited to the group solicitation meetings and 316 contributed to the PAC—representing 51.8% of those solicited and 59.5% of those called to group meetings (I 519(a), 520(Exhibit B), 521).

United Technologies Corporation and UTC PAC

Employees are asked to donate to UTC PAC to help their employer.—Solicitation letters sent to employees of United Technologies Corporation (UTC) in 1979 and 1980 announce: "The purpose of UTC's PAC continues to be to preserve and strengthen the American private enterprise system, and in particular, to properly advance the interests of the industries and types of business in which our company is or may be engaged" (I 323, 329). An August 1980 solicitation letter states:

> "We *have* strengthened our relationships with our 'constituent' Senators and Congressmen, and since

> 1976 the Congress *has* steadily grown more business-oriented and more national security conscious. . . .
>
> One or more of us on the PAC Steering Committee has developed a personal relationship with each incumbent to whom we give campaign contributions. We have carefully evaluated his or her votes and actions—on all matters of general interest to the business community and on specific issues vital to UTC" (I 366, emphasis in original).

The "Criteria (Guidelines) for Campaign Contributions from UTC's PAC," which are attached to written solicitations, state that the PAC is operated "so as to broaden and strengthen our relationship with Senators and Congressmen representing states and districts where we have plants and people," and that "[w]here an incumbent has an anti-business philosophy as reflected by his votes, we examine the qualifications of his challenger" (I 366).

Employees are called together in group solicitation meetings.—After written solicitations have been mailed to employees' homes, local plant managers call United Technologies employees together in "report session" meetings. In a July 1978 memorandum discussing a scheduled group meeting of "senior Pratt and Whitney people," a corporation official instructed supervisory employees that "It is desired that these invitations be issued by word of mouth." At these "report sessions" an officer of the corporation or its PAC discusses "corporate government relations activities . . . and the role of corporate political action committees and UTC PAC in our election system." The meeting announcements state that they are called "to discuss the activity of the UTC Political Action Committee," refer to written solicitations recently mailed to the employees, and make clear that the PAC is the principal topic of the sessions. In response to a 1979 Tyke Research Associates questionnaire asking "What methods of solicitation have you found to be most effective," UTC PAC replied "report sessions at division and

subsidiary plant locations" (I 308, 316, 318, 333, 340-43, 347-49, 362, 391).

Senior corporate officials solicit donations to UTC PAC and resolicit employees who decline to contribute.—United Technologies' Chairman and its President have sent a joint letter to senior employees urging them to contribute to the PAC. In addition, the President or Chairman of each major UTC division and subsidiary writes employees personally to ask them to contribute. Employees also receive a solicitation letter from the UTC PAC Chairman twice in each election year and once in off-years. Employees are solicited at Senior Management Council Meetings and told (as stated in the minutes of a meeting of the senior staff of a UTC subsidiary) that "The Political Action Committee is near and dear to the heart of UTC Management." Finally, Division Presidents and Chairmen send the employees follow-up solicitation materials. For example, a November 1980 letter from the Chairman of Carrier Corporation to Carrier employees stated: "Some of you have responded but we believe that the response could be better. Therefore, we urge that you give this important matter further careful consideration if you have not made a contribution. Prompt action on your part would be deeply appreciated as the UTC PAC needs money now." (I 327, 335, 365, 369, 372, 377, 382).

Employee donations to UTC PAC.—In 1980 more than half of the top 306 UTC employees donated to the PAC. The contribution rate among "senior management" (as defined by the corporation) has been 85% and 88% in the two most recent election years. The average contribution by United Technologies employees during election years has been between $135 and $142; among "senior management" the average contribution was $865 in 1978 and $838 in 1980 (I 392, 522(f), 522(i), 525(b)).

Winn-Dixie Stores, Inc., and the Sunbelt Good Government Committee

Employees are pressured to donate to SGGC to help their employer.—Virtually every written solicitation made by Winn-Dixie to its employees informs them that: "Since Winn-Dixie Stores, Inc. is expressly prohibited by law from using corporate funds for political contributions to candidates for federal offices, the company in 1975 established a Political Action Committee . . . to solicit funds from Winn-Dixie employees for the purpose of providing financial support to such candidates who have demonstrated a basic understanding of our food industry and who support the free enterprise system." A 1977 employee solicitation states "Only by your contributions can the Committee actively participate in the election of persons who hold a positive attitude toward our food industry," and PAC materials distributed to employees discuss specific legislative proposals that would be "detrimental" to the company's interests if adopted (I 411, 413, 414, 417(a)-417(c), 418, 421, 422, 425(a)-425(l), 427).

Employee donations to SGGC are solicited when annual bonus checks are handed out.—In June of each year senior employees of Winn-Dixie receive their annual bonuses from their district managers. Enclosed in the same envelope which contains their bonus check, the employees receive solicitation materials asking them to make donations to SGGC—including a personally addressed letter signed by their supervisor. The minutes of an Executive Committee meeting of the corporation indicate that "management solicitation of contributions from executive or administrative personnel is permissible," and the Company has admitted that at least one Division Manager made oral admonitions to contribute to the PAC when giving his employees their bonus checks (I 407, 526(o)-526(r), 528(c), 528(d)).

Senior Winn-Dixie officials solicit donations to SGGC and resolicit employees who decline to contribute.—The President of Winn-Dixie has sent employees the annual

PAC solicitation enclosed with bonus checks each year. In 1980, a personal letter from Division Managers was also enclosed in employees' bonus envelopes delivered to them by their Division Managers. In September 1977, Tine W. Davis, head of Winn-Dixie's Montgomery Division and Corporate Vice President sent his employees letters informing them that "participation to date from our Montgomery Division has been rather disappointing," and urging them "seriously to consider your financial support" of the PAC. The minutes of an August 1979 meeting of the Executive Committee of Winn-Dixie Stores urged contributions by "an executive and administrative personnel not contributing to the committee." Following the written solicitations distributed with employee bonuses by their division managers, it is conceded that "[f]or several weeks, thereafter, the Chairman of the Committee [PAC] does make a written report to the applicable Division Managers and other officials" of the contributions received from individual employees (I 407, 411, 413, 415, 417, 422, 423, 427, 526(r)).

Employee donations to SGGC.—The average annual PAC contribution rate among corporate officers in election years has ranged from 74% to 77%. Winn-Dixie employees earning $35,000 or less are asked to donate 1% of their total compensation to the company's PAC and employees earning more are asked to contribute 2%. The average annual contribution to the PAC by Winn-Dixie employees was $463 in 1978 and $428 in 1980; the average PAC contribution in 1980 by the corporate officers was $1,526 (I 422, 427, 430, 526(d), 526(h), 526(i)).

* * * *

The facts detailed above concerning the four corporations came to light in the discovery proceedings that followed the District Court's 1980 statutory ruling, and were subsequently placed before the Court of Appeals and relied upon in the briefs and arguments for the plaintiffs. The FEC complained of the use by plaintiffs of these "new facts" confirming those earlier put before the Com-

mission, because they were elicited in the trial court proceedings after the FEC refused to investigate. But the Commission's brief in the court below conceded that they do not in any way alter its reading of Section 441b, and reasserted its view that all of these documented solicitation practices are authorized by the statute. Thus the Commission concluded (br. 18, n.20) that: "[A] review of those facts [concerning the four corporations] fails to reveal any activity by the corporation which is in violation of the Act. Rather, they show solicitations being conducted in a manner consistent with § 441b(b)(3)." An important federal question of first impression arises from the Commission's wholly permissive statutory construction.

REASON FOR GRANTING THE PETITION: AN IMPORTANT FEDERAL QUESTION OF FIRST IMPRESSION IS PRESENTED IN THIS CASE

This case presents an important federal issue of first impression: *whether reasonable limits apply under the provisions of 2 U.S.C. § 441b to the pressures which corporations may exert upon their employees for contributions to the corporation's PAC fund. The employment*-derived basis of corporate PAC money and its business-interest use by the corporations for federal election donations violate the statute on its face. Such corporate donations to federal candidates are plainly a "contribution or expenditure in connection with" a Congressional election, as defined by 2 U.S.C. § 441b(a), and nothing in the statute validates such use of PAC funds derived from employment pressures and from the employment relationship. True, § 441b(b)(2)(C) authorizes the "establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation. . . ." But this general authorization nowhere intimates that Congress thereby approved corporate use in federal election campaigns of monies given by their employees as a result of employment-related pressures exerted by the employer.

To recognize the Congressional intention to prohibit corporations from making contributions with funds out of the corporate treasury and at the same time to impute to Congress an intention to permit corporate political action funds obtained through irrestible pressure exerted upon their employees "is to infer Congressional idiosyncracy." *Keifer & Keifer* v. *Reconsideration Finance Corp.*, 306 U.S. 381, 393 (1939). There is no possible basis for inferring that Congress intended to bar a corporation from using its own funds in federal elections while at the same time permitting the corporation to use funds it extracted from employees through its corporate power. There is not a line in the language or legislative history of the statute that supports such Congressional idiosyncracy.

Indeed, this Court has already rejected in *Pipefitters* so unprotective a construction of the statute. Soon after the 1971 FECA amendments which authorized both corporations and unions to solicit federal election funds from their respective constituencies (corporate stockholders and union members), this Court delineated the limitations upon unions' means of soliciting donations from their members. In *Pipefitters Local Union 562* v. *United States*, 407 U.S. 385 (1972), the Court emphasized (at 414) that PAC payments by union members must be "free choice donations" and (at 413) that they must not be "payments that are effectively assessed, that is solicited in circumstances inherently coercive." Constitutional concerns underlay that judical gloss, for no express language of the statute bars solicitation under "inherently coercive" circumstances.

Avoidance of doubt about the statute's constitutionality compels even more clearly here the application of a safeguard laid down in *Pipefitters* where no employment relationship was in view. In the intimate and dependent relationship between the employer and his career employee, this Court's *Pipefitters* prohibition of political monies extracted in "circumstances inherently coercive" is even

more necessary where it is not the union that is soliciting the worker's political donation but the employer who is soliciting his own employees. Indeed, when it comes to the delicate nature of the employer-employee relationship, the Commission's self-imposed blindfold dishonors its own recognition in *SUNPAC* (A.O. 1975-23, p. 2) of "a potential for coercion which is inherent in the employment relationship and which may be triggered by solicitation of employees by or on behalf of an employer." [8]

That same potential for coercion was recognized by this Court as long ago as 1882. In *Ex parte Curtis*, 106 U.S. 371, 374 (1882), which upheld a statutory ban on political solicitation of a federal employee by another employee, this Court observed:

> "If contributions from those in public employment may be solicited by others in official authority, it may be easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal, as a breach of some supposed duty, growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior as to promote the political views of the contributor."

Similar is the ruling in *Civil Service Commission* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), where this Court upheld Hatch Act provisions because of the danger that employees may be induced to undertake political activity "in order to curry favor with their

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[8] It is no answer that the statute expressly forbids threats or sanctions for failing to donate. That provision was already in the statute when this Court added the *Pipefitters* gloss banning PAC donations "solicited in circumstances inherently coercive." When a career employee is told that his employer needs his political support, is called to group solicitation sessions, resolicited by high officials and sometimes by his own supervisor, surely the circumstances are inherently coercive.

superiors rather than act out their own beliefs." The opinion in *Letter Carriers* upheld the statutory ban on employee political activity because of the danger of such coercion (413 U.S. at 566):

> "A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than act out their own beliefs."

Indeed, the Solicitor General had urged in *Letter Carriers* (Brief for Appellants at p. 10) the very point which we urge here:

> "The prophylactic approach of the Hatch Act also serves to assure that government employees will not be or feel themselves compelled to engage in unwanted partisan political activities in order to curry favor with their superiors and enhance their prospects for continued employment or for advancement. Such pressures can be brought to bear on employees in extremely subtle ways beyond the effective reach of any anti-coercion regulation, no matter how tightly drawn. Indeed in many instances the employee might feel that his prospects for job advancement would be enhanced by political activity aligned with his superior's partisan political predilections."

The corporate solicitation practices documented in this case and reviewed in the Statement exploit the inherent coercions of the employment relationship recognized by this Court in *Curtis* and *Letter Carriers*. Thus, corporations pressure their own employees to donate in the employer's business interest. Dart tells its employees to give help candidates who "support business and the free market system." Eaton tells them to give to help candidates who have "understanding of busi-

ness needs" and to protect "the future of your company." United Technologies says that PAC donations "will advance the interests of the industries and types of businesses in which our company is or may be engaged." Winn-Dixie tells employees that the PAC solicits their money to support candidates who have "a basic understanding of our food industry."

Three corporations call their senior employees into group meetings to bring home the message. At Dart the result is contributions because employees "feel a need to be part of the group." At Eaton, the taped slide-show presentation used in the sessions underscores to solicited employees that they should "get into politics or get out of business." And at United Technologies, group meetings have "brought the PAC activity down to brass tacks" for employees. All the companies cite personal meetings as their most effective solicitation method.

At all four companies supervisor involvement is added to other fund-raising pressures. As the head of Dart Industries proudly confessed, when employees "don't give, they get a sell." At Eaton, solicitation sessions are convened by the local plant manager, and employees in supervisory relationship to others attend—as they do at Dart and United Technologies. At United Technologies, solitication letters are sent by PAC officials, by the Corporation President and by its Chairman, and finally by the Presidents of subsidiary companies to employees working under them. And at Winn-Dixie, division managers personally deliver their own written solicitation, and sometimes oral admonitions as well, when giving employees their annual bonus checks.

In our democratic system of government that depends on freedom to engage in and to abstain from political action, political exactions have frequently invoked not only statutory limitations but even constitutional concerns. Compulsion to donate has been held by this Court to violate the First Amendment where the Government is the em-

ployer exerting the compulsion. *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977); *Branti* v. *Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980). And even where the employment relationship is a purely private one, the First Amendment issues which arise from statutory authorization of compulsion upon the employee to make political donations has required a confining statutory construction. *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961); *Brotherhood of Ry. and S.S. Clerks* v. *Allen*, 373 U.S. 113 (1963). The Federal Election Commission's view that the federal statute authorizes the solicitation practices exposed in this case runs counter to the *Street* principle, succinctly stated by Justice Douglas in his concurring opinion (367 U.S.. at 776) that the individunal "should be allowed to enter the group with his own flag flying . . . and he should not be required to finance the promotion of causes with which he disagrees."

It is these constitutional concerns that were reflected in the *Pipefitters* construction of the statute as banning PAC funds "solicited under circumstances inherently coercive." These same constitutional considerations are present here and compel application of this Court's statutory construction in *Pipefitters* as the safeguard against coercive corporate solicitation practices. In conformity with the established constitutional avoidance rule of construction applied in *Street* in a closely analogous context, the courts below should have applied the *Pipefitters* ban on inherent coercion instead of approving the FEC's "no holds barred" reading of the statute.

The question here presented concerning such solicitation practices is the more important because of the vast numbers of career employees potentially subject to employment pressure for payments to a corporate political fund. The fourteen hundred largest corporations in the nation have nearly one million career employees who can be subjected to the kinds of political fund solicitation practices

exposed in the present case (I 1604, 1605, 1609). Within a period of five short years following the SUNPAC rulings, corporate PACs have multiplied to the point where there were more than twelve hundred such corporate funds in the 1980 Federal elections, and the number continues to grow. A statutory construction which leaves a million career employees unprotected against pressure for donations to the corporate federal election campaign fund is disturbing in its implications both for civil liberties and for freedom of federal elections from the dominating influence of corporate power.

Yet both this Court's gloss in *Pipefitters* and the constitutional implications of a statutory construction which makes employees bear the burdens of corporate elections spending have been shrugged off in this case by the FEC and by the lower courts. Plenary review and an authoritative resolution by this Court is thus required. Only such review can assure that employer pressure for political tribute from employees—a new phenomenon under the federal election laws—does not become the means for erosion of cherished political liberties.

CONCLUSION

It is submitted that the writ should be granted.

Respectfully submitted,

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March 11, 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 81-1044

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Appellants

v.

FEDERAL ELECTION COMMISSION, *et al.*

[Filed Oct. 26, 1981]

Appeal from the United States District Court for the District of Columbia

Before ROBINSON, *Chief Judge*, and TAMM, MacKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS and GINSBURG, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

On consideration of the foregoing, it is ORDERED by the Court *en banc* that the order entered herein on August 26, 1981 be and hereby is vacated to the extent that it consolidated this cause with No. 81-1664, *International Association of Machinists and Aerospace Workers* v. *Federal Election Commission*; and

It is further ORDERED and it is ADJUDGED by the Court *en banc* that the judgment of the District Court appealed from in this cause be and hereby is affirmed substantially for the reasons set forth in the memorandum opinion filed by the District Court on December 16, 1980.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge MacKinnon did not participate in the foregoing decision.*

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* Paragraph added by Order of the Court of Appeals entered December 16, 1981.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0354

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*
Defendants.

[Filed Oct. 16, 1980]

ORDER AND JUDGMENT

In accordance with the accompanying Memorandum Opinion, it is this 16th day of December, 1980

ORDERED that the plaintiffs' motion for summary judgment as to the first cause of action is denied and defendants' motion for summary judgment is granted; judgment on plaintiffs' first cause of action is entered for defendant and that part of plaintiffs' complaint is dismissed with prejudice. The Court having determined that there is no just reason for delay, final judgment is hereby entered for defendants as the first cause of action, and it is *

FURTHER ORDERED that defendants' motion to dismiss plaintiffs' second, third, and fourth causes of action is denied; and it is

FURTHER ORDERED that a status call will be held on December 22nd, 1980 at 9:30 a.m. to consider addi-

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* Paragraph printed as amended by Order of the District Court entered January 8, 1981.

tional proceedings necessary to prepare the remaining constitutional questions for certification to the en banc Court of Appeals.

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0354

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*
Defendants.

[Filed Oct. 16, 1980]

MEMORANDUM OPINION

Barrington D. Parker, District Judge:

This suit under the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431-443 (as amended), presents questions concerning solicitation of corporate employees by political action committees (PACs). The first issue is whether the defendant Federal Election Commission (FEC or Commission) acted contrary to law in dismissing without investigation plaintiffs' administrative complaint alleging that eleven corporations[1] were violating 2 U.S.C. § 441b(b) by soliciting political contributions under "inherently coercive" conditions.[2] The remaining

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[1] Plaintiffs in this action are the International Association of Machinists; its president, William Winspisinger; a trustee of its pension fund, William Glover; two stockholders of Eaton Corporation (one of the respondent corporations), Alan and Anne Morrison; and two "registered voters" Judy Reardon and Rebecca Ward. The corporations named as respondents in the administrative complaint are Dart Industries, Eaton Corporation, General Electric, General Motors, Grumman Corporation, International Paper, Union Camp, Union Oil, United Technologies, and Winn-Dixie.

[2] U.S.C. § 441(b)(3) which places limits on solicitations to political action funds, provides:

> It shall be unlawful—
>
> (A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical

issues, which must be decided only if the FEC's dismissal of the complaint is upheld, are whether, by sanctioning solicitations under "inherently coercive" conditions, section 441b(b)(3) violates constitutional rights guaranteed by the first and fifth amendments. If these claims must be decided, plaintiffs ask that they be certified to the en banc Court of Appeals pursuant to 2 U.S.C. § 437h.[3] The parties have filed cross-motions for summary judgment on the first issue, and the FEC has moved to dismiss the remaining constitutional claims. After considering the parties' memoranda and their presentations at oral argument, the Court concludes first, that the FEC's dismissal of plaintiffs' administrative complaint should be sustained and second, that plaintiffs' constitutional challenges to the Act must be certified to the Court of Appeals.

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force, job discrimination, or financial reprisals; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

[3] 2 U.S.C. § 437h provides, in relevant part:

(a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality, of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

Background

The material facts concerning plaintiffs' first claim are not in dispute. On October 9, 1979, pursuant to 2 U.S.C. § 437g(a)(1), the plaintiffs filed an administrative complaint with the FEC. On December 7, 1979, the Commission's General Counsel transmitted the General Counsel's Report on this complaint to the Commission, with the recommendation that the Commission find "no reason to believe" that there had been a violation of FECA. Six days later, the Commission unanimously adopted this recommendation and the complaint was dismissed without further investigation by the FEC.[4]

In substance the administrative complaint alleged that eleven corporations were systematically violating section 441b(b)(3) of the Act by soliciting contributions to political action committees from "unprotected" executive and administrative personnel under "inherently coercive" conditions. Although the complaint alleged no acts that are illegal *per se*, plaintiffs argued that if section 441b(b)(3) were to be construed to allow the practices described in the administrative complaint, it would be unconstitutional in that it sanctioned the violation of employees' first amendment rights.

In their complaint to the Commission, the plaintiffs adduced two types of evidence to show coercive corporate solicitation. First, plaintiffs argued that the method of solicitation employed by the respondent corporation is "pregnant with coercion" in that the solicited employees, who are mostly middle-level managers and professionals

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[4] The Commission issued no statement of reasons supporting dismissal. Plaintiffs have aimed their arguments at the General Counsel's Report. *See* Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 28. Accordingly the Court will consider that document as providing the basis for the Commission's action. *See* Democratic Senatorial Compaign Committee v. FEC, No. 80-2974, slip op. at 9 (D.C. Cir. October 9, 1980).

with no contractual job security, are approached for contributions while in the workplace by their immediate supervisors. Second, the complaint alleged that the response to the solicitations revealed illegitimate pressures to donate: employee giving among the named corporations was far greater than the average contribution made by members of the general public with comparable incomes; substantial PAC donations were made to candidates who belonged to the political party other than the chosen party of the contributor, or who were running in states other than those in which the contributing employees resided; employees were unable to designate the recipients of their contributions; and finally, large numbers of contributions in precisely the same amount indicated orchestration by the corporation. Based on these data, much of which was gleaned from public reports filed with the FEC, plaintiffs' complaint concluded that there is "no possible room for a conclusion that the corporate PACs are operating with employee contributions that are genuinely free and voluntary political donations." [5]

The administrative complaint also presented legal questions which are again raised in their motion for summary judgment. First, plaintiffs argued for a different standard of what constituted prohibited "coercion" than that provided by the plain words of section 441b(b)(3). Relying on *Civil Service Commission v. National Ass'n of Lettercarriers*, 413 U.S. 548 (1973), plaintiffs insisted that, in order to be constitutional, FECA must be interpreted to bar the in-person, in-the-office requests for contributions described in the complaint.[6] Second, plaintiffs argued that if the FEC interpreted FECA as proscribing only the specific acts described in section 441b(b)(3), then the provisions allowing corporations to solicit executive and administrative personnel must be

[5] Administrative Complaint at 12.

[6] *See* Administrative Complaint 8-14.

declared unconstitutional as they would violate the rights of corporate employees, of unions and union members, and of corporate shareholders.[7]

In his report to the Commission, the FEC's General Counsel disagreed with all of plaintiffs' claims and recommended that the Commissioners find no reason to believe that the respondents were violating FECA. In advising the Commission to dismiss the complaint, the General Counsel pointed out that all of the allegedly coercive practices cited by plaintiffs were in fact permissible under the present statute. The Report then rejected plaintiffs' constitutional argument for broader protections for corporate employees on the grounds that courts have previously upheld the power of Congress to regulate the scope and manner of corporate and union political solicitations. On December 13, 1979, the Commissioners voted 4-0 to find no reason to believe that the named corporations had violated the Act.[8]

Legal Analysis

Review of the Commission's Action

The Court has only a limited role in reviewing the FEC's decision. The Commission's dismissal of an administrative complaint should be set aside only if "the agency acted in a manner which was arbitrary or capricious, was an abuse of discretion, or was otherwise contrary to law . . . ." *Hampton v. Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 at 50,439 (D.D.C. 1977), *aff'd*, No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished opinion). *See In re Carter-Mondale Reelection Committee, Inc.*, No. 80-1841, slip op. at 15 (D.C. Cir. September 12, 1980); *In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044,

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[7] *Id.* at 12, 36-42.

[8] Commissioner Harris recused himself and Commissioer Aikens was not present.

1046 (D.D.C. 1979). Applying this standard to the record before it, the Court will not set aside the FEC's decision to dismiss the administrative complaint.

First, the Court concludes that the FEC applied the proper legal standard in determining what constitute prohibited solicitation practices under FECA. Plaintiffs' reliance on the *Lettercarriers* decision is misplaced. In *Lettercarriers*, the Supreme Court rejected constitutional challenges to the Hatch Act's prohibition on government employees taking "an active part in political management or in political campaigns." 5 U.S.C. § 7324(a)(2). Plaintiffs rely on the Court's observation that some of the policies behind the statutory proscription:

> was to further serve the goal that employment and advancement in the government service not depend on political performance and to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or to perform political chores in order to curry favor with their superiors rather than to act out their own beliefs.

413 U.S. at 566. Plaintiffs argue that this reasoning requires the FEC to read FECA's provisions on corporate solicitation more rigorously; in person-solicitation of corporate employees by their superiors in the workplace is inherently coercive and must therefore be forbidden.

This interpretation misconstrues the import of *Lettercarriers*. The decision sanctions limits on political activity ordinarily protected by the first amendment in order to preserve the integrity of government. The need to remove political pressures was justified not as a means of protecting the first amendment rights of government employees, but to advance the highly valued public policy of nonpartisan administration. The reasoning of *Lettercarriers* cannot be stretched to support a first amendment-based ban on the type of solicitation of corporate employees now permitted by FECA.

The FEC interpretation limits section 441(b)(3) to proscribing only those acts described by the statutory language. This reading is consistent with the legislative history of the provisions regulating solicitation of corporate employees. Congress was aware of the danger of coercion. It deliberately enacted more stringent restrictions on corporate solicitations aimed at low-level employees than on those directed toward administrative and executive personnel.[9] Managerial personnel, according to the conference report on the provisions, needed less protection.[10]

These individuals, however, are still shielded from coercion by section 441b(b)(3), which imposes restrictions on all categories of solicitations. In enacting that provision, the Congress adopted the Supreme Court's holding in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972).[11] That case therefore provides considerable guidance in interpreting the scope of the present statute.

In *Pipefitters*, the Court interpreted recent amendment to the Corrupt Practices Act permitting corporations and labor unions to solicit contributions to PACs, but making it unlawful to secure contributions through "physical force, job discrimination, financial reprisals, or the threat of force, job discrimination or financial reprisal . . . ." 18 U.S.C. § 610 (1970) *as amended by* Federal Election Campaign Act of 1971, Pub. L. No. 92-225 § 205, 86 Stat. 10. The Court held that to comply with the statute, the "solicitation must be conducted under circumstances

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[9] *Compare* § 441b(b)(4)(B), which allows corporate solicitation directed at "employees" of the corporation to be made only by mail and with assurances of anonymity for contributors, with the less restrictive corporate solicitations directed at "executive or administrative personnel" allowed by § 441b(b)(4)(A)(i).

[10] H.R. Rept. No. 1057, 94th Cong., 2d Sess. 62.

[11] *Compare* 407 U.S. at 414 *with* 2 U.S.C. § 441b(b)(3)(B) and (C).

plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power." 407 U.S. at 414. The Court explained that "[w]hether the solicitation scheme is designed to inform the individual solicited of the political nature of the fund and his freedom to refuse support, is therefore, determinative." 407 U.S. at 415. These requirements have now been codified at 2 U.S.C. § 441b(b)(3). The Court, however, rejected the Government's contention that 18 U.S.C. § 610 precluded union officials from soliciting contributions in person, stating

> [n]owhere, however, has Congress required . . . that union officials be barred from soliciting contributions or even precluded from determining how the money raised will be spent.

407 U.S. at 415. This observation applies to the present statute as well.[12] Nowhere does FECA forbid corporate supervisors from asking their subordinates for contributions, as long as they comply with the provisions of section 441b(b)(3).

Applying the statutory criteria in light of *Pipefitters*, this Court concludes that the Commission did not act contrary to law or abuse its discretion in dismissing the administrative complaint. Plaintiffs' presentation to the FEC, although detailed, is composed entirely of circumstantial evidence of varying strength. Neither the administrative complaint nor the complaint in this Court, offers direct evidence of corporate wrongdoing. In their motion for summary judgment, plaintiffs in effect ask this Court to draw the inferences which the Commission

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[12] Congress deleted a provision from the proposed 1976 amendments which would have prohibited supervisors from soliciting their subordinates. *Compare* S. 3965, 94th Cong., 2d Sess. § 321(b)(2)(B) *with* 2 U.S.C. § 441b(b)(3).

refused to draw when it reviewed the same records. Sitting as a trier of fact, the Court might well draw the conclusions plaintiffs advance. But to do so while conducting a limited review of the FEC's action would be an improper substitution of its judgment for that of the agency.

Constitutional Issues

In both the administrative complaint and their motion for summary judgment, plaintiffs argue that the interpretation of the statute ultimately adopted by the FEC raises three constitutional questions. Plaintiffs maintain that if the law permits the type of corporate solicitations described in the administrative complaint, it *may be* constitutionally defective in that it violates (1) the first amendment rights of corporate employees by sanctioning "coercive" solicitations; (2) the fifth amendment rights of labor unions in that unions "have no comparable economic power over thousands of career employees . . ."; and (3) the first amendment rights of shareholders by compelling shareholders to finance coercive political solicitations.

These same claims are realleged in the civil complaint as the second, third and fourth causes of action. Plaintiffs' motion for summary judgment, however, does not seek a ruling on these constitutional questions. Instead, it asks only for a reversal of the Commission's dismissal of the administrative complaint. Should this Court not reverse the agency's action, plaintiffs urge that the three constitutional questions purportedly created by the FEC's decision be certified to the en banc Court of Appeals pursuant to 2 U.S.C. § 437h.

Plaintiffs' request presents a question as to the proper role of the district court in reviewing constitutional issues arising in the course of a review of FEC action. The constitutional claims are arguably before this Court as part of plaintiffs' motion for summary judgment. The

Court, however, believes it should not rule on them in light of section 437's requirement that "all questions of the constitutionality of the [Federal Election Campaign] Act" be resolved by the en banc Court of Appeals. Once constitutional questions emerge in the course of litigation, the statute requires prompt certification to the appellate court. *See Central Long Island Tax Reform Immediately Committee v. FEC*, 616 F.2d 45, 49 (2d Cir. 1980) (en banc court considering issues raised for the first time in answer and counterclaim and immediately certified by district court).[13] As plaintiffs have repeatedly pointed out, the constitutional questions in this case need to be answered *only* if the FEC's interpretation of the statute is sustained on summary judgment. Since this Court has accepted the Commission's position, the constitutional questions presented in plaintiffs' second, third and fourth causes of action are now ripe and should be considered under FECA's expediting provision.[14]

District courts have limited roles in 437h proceedings. When presented with a complaint asking for certification, the court's chief function is to compile a factual record to enable the Court of Appeals to review the constitutional issues presented. *See Buckley v. Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975). This record, along with the district court's identification of the constitutional questions, is then certified to the appellate court. *Buckley v. Valeo*, 519 F.2d 821, 835 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976). The district court *may* resolve

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[13] A district court need not certify issues which are not ripe for adjudication. *See* Martin Tractor v. FEC, 627 F.2d 375 (D.C. Cir. 1980).

[14] The Court is aware that this course could result in parallel proceedings in the Court of Appeals, with a three-judge panel hearing an appeal from this Court's ruling on the first cause of action and the en banc Court considering the constitutional questions. Such anomalies are not unprecedented in 437h proceedings. *See* Buckley v. Valeo, 424 U.S. at 9 n.6 (three-judge district court and en banc Court of Appeals simultaneously considering interrelated questions of constitutionality of FECA).

threshold questions concerning a federal court's power to decide the particular claims under Article III, or it may pass these questions along to the Court of Appeals along with the substantive constitutional claims. *See Clark v. Valeo*, 559 F.2d 642, 645-46 n.2 (D.C. Cir. 1977).

Defendants have moved that the second, third and fourth causes of action be dismissed on the grounds that (1) they fail to state a claim on which relief can be granted and (2) in any event, plaintiffs do not have standing to raise them. Plaintiffs' claims are neither frivolous nor so insubstantial as to warrant dismissal for failure to state a claim.[15] As to the standing issue, the Court believes that the plaintiffs have made a threshold showing of a "distinct and palpable injury" of a level sufficient to satisfy Article III. *Warth v. Selden*, 422 U.S. 490, 501 (1975). The stockholder plaintiffs are injured if corporate assets are diverted to political activity they oppose. In effect, a stockholder's interests may be diverted by the corporation to sponsor speech which may not accord with his or her belief. The union plaintiffs suffer in that they are placed at a disadvantage vis-a-vis corporations in their ability to fund political speech. Finally, despite the absence of corporate administrative or executive personnel among the named plaintiffs, the Court finds that they have standing to raise any injury to the first amendment rights of corporate employees resulting from the challenged practices. Substantial authority supports vicarious assertion of constitutional rights. *See, e.g., Carey v. Population Services International*, 431 U.S. 678 (1977); *Craig v. Boren*, 429 U.S. 190, 192-97 (1976); *Barrows v. Jackson*, 346 U.S. 249 (1953). The Court will therefore deny the motion to dis-

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[15] *See* Gifford v. Congress, 452 F. Supp. 803 (E.D. Cal. 1978) (frivolous constitutional claims dismissed); Mott v. FEC, 494 F. Supp. 131 (D.D.C. 1980), *appeal docketed* Nos. 80-1949 (August 12, 1980), 80-2069 (September 4, 1980) (claims previously decided by Supreme Court are insubstantial and need not be certified).

miss for lack of standing. The parties are of course free to include the standing issue among the questions to be certified to the Court of Appeals. *See Buckley v. Valeo*, 424 U.S. at 11-12 & n. 11.

An appropriate order and judgment accompanies this Memorandum Opinion.

Entered: December 16th, 1980.

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

APPENDIX C

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 1040

IN THE MATTER OF

DART INDUSTRIES, EATON CORPORATION, GENERAL ELECTRIC, GENERAL MOTORS, GRUMMAN CORPORATION, INTERNATIONAL PAPER, STANDARD OIL OF INDIANA, UNION CAMP, UNION OIL, UNITED TECHNOLOGIES, WINN-DIXIE

CERTIFICATION

I, Marjorie W. Emmons, Recording Secretary for the Federal Election Commission's Executive Session on December 13, 1979, do hereby certify that the Commission determined by a vote of 4-0 find no reason to believe the respondents have violated the Federal Election Campaign Act, and close the file in the above-captioned matter.

Commissioners Friedersdorf, McGarry, Reiche, and Tiernan voted affirmatively for the above determination; Commissioner Harris recused; Commissioner Aikens was not present during consideration of this matter.

Accordingly, the file in this matter has been closed.

Attest:

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary to the Commission

12/14/79
Date

[SEAL]

APPENDIX D

Provisions of the Federal Election Campaign Act (codified at Title 2, United States Code)

§ 437g. Enforcement *

(a) (1) Any person who believes a violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred may file a complaint with the Commission. Such complaint shall be in writing, shall be signed and sworn to by the person filing such complaint, and shall be notarized. Any person filing such a complaint shall be subject to the provisions of section 1001 of Title 18, United States Code. The Commission may not conduct any investigation under this section, or take any other action under this section, solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) The Commission upon receiving any complaint under paragraph (1), and if it has reason to believe that any person has committed a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or, if the Commission, on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, has reason to believe that such a violation has occurred, shall notify the person involved of such alleged violation and shall make an investigation of such alleged violation in accordance with the provisions of this section.

(3) (A) Any investigation under paragraph (2) shall be conducted expeditiously and shall in-

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* After the Federal Election Commission had completed its action on plaintiffs' administrative complaint, § 437g was amended by Public Law No. 96-187, effective January 8, 1980. The version of § 437g that was in effect during the FEC's consideration of plaintiffs' administrative complaint is printed herein.

clude an investigation, conducted in accordance with the provisions of this section of reports and statements filed by any complainant under this title, if such complainant is a candidate.

* * * *

(5)(A) If the Commission determines that there is reasonable cause to believe that any person has committed or is about to commit a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the Commission shall make every endeavor for a period of not less than 30 days to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with the person involved, except that, if the Commission has reasonable cause to believe that—

(i) any person has failed to file a report required to be filed under section 434(a)(1)(C) for the calendar quarter occurring immediately before the date of a general election;

(ii) any person has failed to file a report required to be filed no later than 10 days before an election; or

(iii) on the basis of a complaint filed less than 45 days but more than 10 days before an election, any person has committed a knowing and willful violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954;

the Commission shall make every effort, for a period of not less than one-half the number of days between the date upon which the Commission determines there is reasonable cause to

believe such a violation has occurred and the date of the election involved, to correct or prevent such violation by informal methods of conference, concliliation, and persuasion, and to enter into a conciliation agreement with the person involved. A conciliation agreement, unless violated, shall constitute a complete bar to any further action by the Commission, including the bringing of a civil proceeding under subparagraph (B).

* * * *

(9) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure on the part of the Commission to act on such complaint in accordance with the provisions of this section within 90 days after the filing of such complaint, may file a petition with the United States District Court for the District of Columbia.

(B) The filing of any petition under subparagraph (A) shall be made—

(i) in the case of the dismissal of a complaint by the Commission, no later than 60 days after such dismissal; or

(ii) in the case of a failure on the part of the Commission to act on such complaint, no later than 60 days after the 90-day period specified in subparagraph (A).

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the action, or the failure to act, is contrary to law and may direct the Commission to proceed in conformity with such declaration within 30 days, failing which the complainant may bring in his own name a civil

action to remedy the violation involved in the original complaint.

(10) The judgment of the district court may be appealed to the court of appeals and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28, United States Code.

* * * *

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corportation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any

kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal, or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization,

or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such so-

licitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

Opposition

FILED
APR 14 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1684

In the Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., PETITIONERS,

v.

FEDERAL ELECTION COMMISSION, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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APRIL 14, 1982

QUESTION PRESENTED

Whether the courts below properly affirmed the Federal Election Commission's dismissal of petitioners' administrative complaint for failing to set forth a violation of the Federal Election Campaign Act.

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INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., PETITIONERS,

v.

FEDERAL ELECTION COMMISSION, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Federal Election Commission ("Commission" or "FEC") requests that the petition for *writ of certiorari* filed by petitioners to review the judgment of the United States Court of Appeals for the District of Columbia Circuit be denied.

OPINIONS BELOW

The unanimous summary affirmance of the court of appeals appears in the appendix to petitioners' brief ("Pet. App.") at 1a. The opinion of the district court is reported at 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9144 at 51,104 and appears with the district court

judgment at Pet. App. at 5a. The district court held that the Commission did not act contrary to law when it dismissed the administrative complaint filed by petitioners. The determination of the Commission dismissing petitioners' administrative complaint appears at Pet. App. at 17a . The Commission's General Counsel's Report is reprinted in the appendix, *infra* ("App.").

JURISDICTION

The judgment of the court of appeals affirming the district court was entered on October 26, 1981. On December 15, 1981, the Chief Justice granted petitioners' motion for an extension of time within which to file a petition for *writ of certiorari*. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are set forth in Pet. App. at 18a-25a.

STATEMENT OF THE CASE

The International Association of Machinists and Aerospace Workers ("IAM") and six individuals [1] filed an administrative complaint with the Commission on October 9, 1979, naming eleven corporations and their political action committees as respondents.[2]

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[1] The six other complainants were William W. Winpisinger, President of IAM, Judy Reardon, Rebecca J. Ward, Anne S. Morrison, Alan B. Morrison and Eugene Glover.

[2] The corporations named as respondents in the administrative complaint were Dart Industries, Eaton Corporation, General Electric, General Motors, Grumman Corporation, International Paper, Standard Oil of Indiana, Union Camp, Union Oil, United Technologies, and Winn-Dixie. *See* Pet. App. at 17a.

The complaint alleged no violation of any express provision of the Act, but urged the Commission to find that certain methods of soliciting contributions to corporate separate segregated funds are contrary to congressional intent in enacting 2 U.S.C. § 441b(b)(3). On December 7, 1979, the General Counsel of the Commission submitted to the Commission a First General Counsel's Report containing a legal and factual analysis of the complaint and a November 9, 1979 Memorandum of Law filed with the Commission by six of the respondent corporations. *See* App. at 1a. The General Counsel's Report recommended that the Commission find "no reason to believe" that the eleven corporations had violated 2 U.S.C. § 441b.[3] On December 13, 1979, the Commission, after considering the General Counsel's Report, determined by a 4-0 vote that there was no reason to believe that the eleven named corporations and their political action committees had violated the Act as alleged in the IAM complaint. Pet. App. at 17a. 2 U.S.C. § 437g(a)(2). Accordingly, it dismissed the administrative complaint, closed its file in the matter, and so notified IAM and the six other complainants.

On February 4, 1980, IAM filed a petition in the United States District Court for the District of Columbia to review the Commission's determination.[4]

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[3] The General Counsel's Report found that the allegedly coercive activities described by complainants were in fact permissible under the Act. Furthermore, the Report found that complainants' argument for an "inherently coercive" standard outside the words of the statute was legally unsupportable. App. at 4a.

[4] Alternatively, IAM sought certification of constitutional questions pursuant to 2 U.S.C. § 437h, regarding the validity of portions of the Federal Election Campaign Act, 2 U.S.C. § 431, *et seq.* ("FECA" or "the Act") in the event that the

Judge Barrington D. Parker affirmed the Commission's determination to dismiss IAM's complaint. Pet. App. at 12a. The court recognized the deference to be accorded to the Commission's determinations in disposition of such complaints, and concluded that the Commission's dismissal of IAM's administrative complaint was not arbitrary, capricious, or otherwise contrary to law. *Id.* IAM filed its Notice of Appeal on January 8, 1981, and the appeal was docketed on March 11, 1981. On October 26, 1981, the *en banc* court of appeals affirmed the judgment of the district court "substantially for the reasons set forth in the memorandum opinion filed" by the district court.[5] Pet. App. at 2a. Petitioners now seek review by this Court of that decision.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners seek to have this Court review the decision of the court below which affirmed the Commission's dismissal of petitioners' administrative complaint as not contrary to law. The decision of the court of appeals concerns straightforward issues of statutory construction on which there is no conflict

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relief requested in the review of the Commission's determination was denied. On June 3, 1981, the district court certified constitutional questions to the United States Court of Appeals for the District of Columbia Circuit. The *en banc* court of appeals unanimously rejected all of IAM's constitutional challenges. *International Association of Machinists, et al.* v. *Federal Election Commission, et al.*, No. 81-1664 (D.C. Cir. April 6, 1982) (en banc).

[5] On August 26, 1981, the court of appeals consolidated the present action brought by IAM pursuant to 2 U.S.C. § 437g (a) (9) with the § 437h action. The court, after oral argument, vacated its order consolidating the cases and issued separate opinions. *See* n.4, *supra*.

among the circuits or with opinions of this Court. Review by this Court is particularly unwarranted because of the substantial deference which this Court has found to be required when reviewing the Commission's interpretation of the Act in the context of a dismissal of an administrative complaint. *Democratic Senatorial Campaign Committee* v. *Federal Election Commission*, —— U.S. ——, 102 S.Ct. 38 (November 10, 1981). Since the court below properly applied this standard of review and unanimously reached a conclusion which is plainly in accord with the statute and does not conflict with the view of any other court, further review by this Court is unwarranted.

1. This Court recently held that the role of the reviewing court in a suit brought pursuant to 2 U.S.C. § 437g(a)(8) is not to decide whether the Commission's interpretation of the Act was correct. Rather, this role is:

> . . . the narrow inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court. To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. [citations omitted].

Democratic Senatorial Campaign Committee v. *Federal Election Commission*, 102 S.Ct. at 46. Further, this Court found that "the Commission is precisely the type of agency to which deference should presumptively be afforded." 102 S.Ct. at 45.[6] The court below

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[6] The Court recognized that:

> Congress has vested the Commission with "primary and substantial responsibility for administering and enforcing

properly applied this standard of review and found that the Commission's dismissal of petitioner's administrative complaint was not contrary to law.

2. The question presented to the Commission in the administrative complaint was whether corporate solicitation of executive and administrative personnel for contributions to the corporation's separate segregated fund established to make contributions to federal candidates is a violation of 2 U.S.C. § 441b(b)(3)(A) as "inherently coercive." Pet. App. at 23a. The Commission declined to find that the activity complained of, on its face, represented a violation of the Act.

This determination that petitioners' administrative complaint did not state a violation of FECA is supported by the plain language of the statute. Section 441b does not prohibit the corporate solicitations challenged in petitioners' administrative complaint. The statute on its face establishes three requirements for the solicitation of contributions from executive and administrative personnel by a national bank, corporation or labor organization. Specifically, the statute provides that:

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the Act," *Buckley* v. *Valeo*, 424 U.S. 1, 109, 96 S.Ct. 612, 677, 46 L.Ed. 2d 659 (1976), providing the agency with 'extensive rulemaking and adjudicative powers." *Ibid.* It is authorized to "formulate general policy with respect to the administration of this Act," § 437d(a)(9), and has the "sole discretionary power" to determine in the first instance whether or not a civil violation of the Act has occurred. 424 U.S. at 112, n.153, 96 S.Ct. at 679. Moreover, the Commission is inherently bipartisan in that no more than three of its six voting members may be of the same political party, § 437c(a)(1), and it must decide issues charged with the dynamic of party politics, often under the pressure of an impending election.

102 S.Ct. at 45.

(1) A national bank, corporation or labor organization may not solicit contributions to its separate segregated fund by threatened or actual force, job discrimination or financial reprisal, *see* 2 U.S.C. § 441b(b)(3)(A);

(2) All solicited employees must be informed of the political purposes of the solicitation, *see* 2 U.S.C. § 441b(b)(3)(B);

(3) All solicited employees must be informed at the time of any solicitation of their right to refuse to contribute without reprisal, *see* 2 U.S.C. § 441b(b)(3)(C).

Petitioners' administrative complaint merely asserted that corporate solicitations of "mid-level career managers and professionals" for contributions to separate segregated funds are inherently coercive, and thus result in non-voluntary "contributions" in violation of 2 U.S.C. § 441b(b)(3). However, as the district court concluded "[n]owhere does FECA forbid corporate supervisors from asking their subordinates for contributions as long as they comply with the provisions of section 441b(b)(3)." Pet. App. at 12a. *See also Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 415 (1972) ("*Pipefitters*") ("[n]owhere, however, has Congress required . . . that union officials be barred from soliciting contributions or even precluded from determining how the money raised will be spent.") Since the practices alleged by petitioners in their administrative complaint to be coercive are not prohibited under FECA, the Commission had a rational and defensible basis for finding "no reason to believe" that the plain language of the statute had been violated. *See DSCC* v. *FEC*, 102 S.Ct. at 46, 47.

3. The legislative history of § 441b also controverts petitioners' allegation that Congress intended to pro-

hibit solicitation of mid-level corporate employees. In 1971, Congress enacted three express exceptions to the overall prohibition on corporate contributions and expenditures in connection with federal elections which are currently codified at 2 U.S.C. § 441b(b)(2)(A)-(C).[7] One of these exceptions provides that a corporation may use treasury funds for the establishment, administration, and solicitation of contributions to a voluntary separate segregated fund for political purposes. 2 U.S.C. § 441b(b)(2)(C).

In fact in 1976, Congress broadened the § 441b exception to permit the use of corporate treasury funds to solicit the corporation's executive and administrative personnel and their families for contributions to a corporation's separate segregated fund. 2 U.S.C. § 441b(b)(4)(A)(i). At the same time, Congress specifically rejected language which would have made illegal the corporate practices challenged by IAM. As the district court noted, "Congress deleted a provision from the proposed 1976 amendments which would have prohibited supervisors from soliciting their subordinates. *Compare* S. 3965, 94th Cong., 2d Sess. § 321b(2)(B) (1976) *with* 2 U.S.C. § 441b(b)(3)." Pet. App. at 12a, n.12. Thus, the legislative history of § 441b does not support petitioners'

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[7] These exceptions arose from a proposal offered by Representative Hansen on the House floor. 117 Cong. Rec. H11476 (daily ed. Nov. 30, 1971). Hansen stated that the purpose of this proposal was "to codify the court decision interpreting [and the legislative history explaining 18 U.S.C. 610] section 610 . . . and to spell out in more detail what a labor union or corporation can or cannot do in a federal election." 117 Cong. Rec. H11477 (daily ed. Nov. 30, 1971) (remarks of Rep. Hansen), *cited in Pipefitters*, 407 U.S. at 410-411.

allegations that Congress intended to prohibit solicitation of mid-level corporate employees.

4. Judicial construction of § 441b also supports the Commission's finding that petitioners' administrative complaint did not state a violation of the Act.[8] In enacting section 441b(b)(3) Congress codified this Court's ruling in *Pipefitters*, *supra*. There, this Court considered the 1971 exception to the overall prohibi-

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[8] Petitioners did not allege any violations of these provisions in their administrative complaint. They did not provide the Commission with any evidence of threatened or actual physical force, job discrimination or financial reprisals as prohibited by § 441b(b)(3)(A); nor did they provide any evidence that any solicited employee was not informed of the political purposes of the solicitation as required by § 441b(b)(3)(B); nor did they provide any evidence that any solicited employee was not informed at the time of any solicitation of his or her right to refuse to contribute without reprisal, as required by 2 U.S.C. § 441b(b)(3)(C). Indeed, the district court found that "[p]laintiffs' presentation to the FEC, although detailed, is composed entirely of circumstantial evidence. Neither the administrative complaint nor the complaint in this court, offers direct evidence of corporate wrongdoing." Pet. App. at 12a.

Petitioners inappropriately make extensive use of the factual record developed in the district court as a basis for the *en banc* court of appeals consideration of constitutional questions certified under section 437h. *See International Association of Machinists* v. *Federal Election Commission*, No. 81-1664 (D.C. Cir. April 6, 1982) (en banc). These facts are also extensively set forth in their petition for *certiorari*. As petitioners note, the Commission objected to the use of these facts before the court of appeals since they were developed after the Commission's dismissal of their administrative complaint and, therefore, have no bearing on the Commission's dismissal of the administrative complaint. Pet. at 20. Moreover, in unanimously rejecting the IAM's constitutional challenge in No. 81-1664, the *en banc* court of appeals found that the "proof plaintiffs offer falls woefully short." Slip op. at 40.

tion on union and corporate contributions, and concluded that solicitation of contributions to a voluntary separate segregated fund was not unlawful provided that no "physical force, job discrimination, financial reprisals, or the threat of force, job discrimination or financial reprisal . . ." was used. 18 U.S.C. § 610 (1970). This Court held that to comply with the statute, the "solicitation must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power." *Pipefitters*, 407 U.S. at 414. The Court explained that "[w]hether the solicitation is designed to inform the individual solicited of the political nature of the fund and his freedom to refuse support is therefore, determinative." 407 U.S. at 415. These requirements were incorporated in section 441b(b)(3) in 1976.

In both 1971 and 1976, the legislative history demonstrates that Congress was particularly sensitive to these concerns that contributions made to the separate segregated fund remain free and voluntary. Congressman Hansen, the author of the 1971 exceptions, explained how Congress balanced the concerns expressed by the Court in *Pipefitters*:

> The essential prerequisite for the validity of such political funds is that the contributions to them be voluntary. For that reason the final section of this amendment makes it a violation of section 610 to use physical force, job discrimination, financial reprisals or the threat thereof, in seeking contributions. This is intended to insure that a solicitor for COPE or BIPAC cannot abuse his organizational authority in seeking political contributions. Of course, nothing can completely

> erase some residual effects on this score, any more than the law can control the mental reaction of a businessman asked for a contribution by an individual who happens to be his banker, or a farmer appoached by the head of his local farm organization. The proper approach, and the one adopted here, is to provide the strong assurance that a refusal to contribute will not lead to reprisals and to leave the rest to the independence and good sense of each individual.

117 Cong. Rec. H11478 (daily ed. Nov. 30, 1971) (remarks of Rep. Hansen). *See also* 117 Cong. Rec. H11482 (daily ed. Nov. 30, 1971) (remarks of Rep. Thompson). Thus, Congress enacted the 1971 exceptions with the following proviso:

> That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, financial reprisal or by dues, fees, or other monies required as a condition of employment, or by monies obtained in any commercial transaction.

18 U.S.C. § 610 as amended by section 205 of FECA of 1971.

Similarly, in 1976, continued concern that solicitations should not be conducted in a coercive manner led Congress to expand protection for employees solicited by their employer or union.[9] As Senator Cannon ex-

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[9] Petitioners contend that the FEC's opinion issued in Advisory Opinion 1975-23, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5151, the "SunPAC" opinion, was somehow responsible for the growth of corporate political activity. Pet. at 5. There is no evidence to support this assertion. Indeed, in the 1976 Amendments, Congress specifically rejected the Commission's interpretation of § 441b in SunPAC. H.R. Rep. No. 94-917,

plained in discussing his substitute bill which eventually was enacted as the FECA Amendments of 1976:

> This same section was further modified to expand the provision prohibiting coercion by corporations and labor organizations by adding three specific prohibitions to protect employees during the solicitation process. In addition, the penalty provisions of S. 3065 were amended to provide up to a 2-year imprisonment or a fine of not more than $50,000 or both, for violation of the coercion prohibition portion of this section.

122 Cong. Rec. 7891 (1976). *See also* H.R. Rep. No. 94-1057, 94th Cong., 2d Sess. 62 (1976). Two of the three measures mentioned by Senator Cannon were enacted into law: a requirement that all solicited employees must be informed at the time of the solicitation of the political purposes of the solicitation, currently 2 U.S.C. § 441b(b)(3)(B); and a requirement that all solicited employees must be informed at the time of any solicitation of their right to refuse to contribute without reprisal, currently 2 U.S.C. § 441b (b)(3)(C).

As this Court stated in *Pipefitters*, 407 U.S. at 415, compliance with such requirements as those set forth in § 441b is "determinative" of whether a solicitation is lawful, and there is no suggestion that the corporate solicitation practices challenged do not meet these express requirements.[10] Where Congress has

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94th Cong., 2d Sess. 6-7 (1976). This prompted careful review of the permissible classes of solicitees and resulted in amendment of the statute to insure the protection of corporate employees from coercion.

[10] The alternative argument put forth by petitioners in the court below was that the statute—if such solicitations are permissible—is unconstitutional. That argument was unan-

explicitly set the balance by imposing specific requirements, the courts below properly upheld the Commission's determination that solicitation practices conducted in accordance with those requirements do not violate the Act.

CONCLUSION

For the foregoing reasons, the petition for a *writ of certiorari* should be denied.

Respectfully submitted,

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APRIL 14, 1982

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imously rejected by the court of appeals in *IAM* v. *FEC*, No. 81-1664 (D.C. Cir. April 6, 1982, (en banc). Those issues, however, are not before the Court in this case which is limited to the question of whether the Commission's dismissal of a complaint for failing to allege a statutory violation is contrary to law.

Appendix

APPENDIX

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463

Executive Session
December 13, 1979

FIRST GENERAL COUNSEL'S REPORT

Date And Time Of Transmittal
By OGC To The Commission 12-7-79

MUR #1040
Date Complaint Received
By OGC: 10/9/79

Staff Member: Federman

Complainant's Name: International Association of Machinists, *et al.*[1]

Respondent's Name: Corporations and Associated Separate Segregated Funds.[2]

Relevant Statute: 2 U.S.C. § 441b

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[1] The complaint lists as complainants: International Association of Machinists, William Winpisinger, President, designated as "union complainants;" Anne S. Morrison, Alan B. Morrison, and Eugene Glover, designated as "stockholder complainants;" Judy Reardon and Rebecca J. Ward, designated as "citizen complainants."

[2] The complaint names as specific respondents: Dart Industries, Eaton Corporation, General Electric, General Motors, Grumman Corporation, International Paper, Standard Oil of Indiana, Union Camp, Union Oil, United Technologies, and Winn-Dixie.

Internal Reports Checked: Reports of Receipts and Expenditures

Federal Agencies Checked: None

SUMMARY OF ALLEGATIONS

The International Association of Machinists and others filed the attached complaint with the Commission pursuant to 2 U.S.C. § 437g(a)(1). The complaint alleges that solicitations by corporations for contributions to their separate segregated funds violate 2 U.S.C. § 441b(b)(3)(A).

The complaint does not allege specific examples of corporate solicitations which included actual or apparent threats of physical force, job discrimination, or financial reprisal in violation of 2 U.S.C. § 441b (b)(3)(A); nor violations of 2 U.S.C. § 441b(b)(3) (B)'s requirement that the solicitation inform the solicitee, at the time of the solicitation, of the political purposes of the separate segregated fund; nor violations of 2 U.S.C. § 441b(b)(3)(C) which requires that the solicitee be informed, at the time of the solicitation, of his/her right to refuse to contribute without reprisal. Rather, the complaint alleges that corporate solicitations of "mid-level career managers and professionals" for contributions to separate segregated funds are inherently coercive, resulting in non-voluntary "contributions" in violation of 2 U.S.C. § 441b.[3]

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[3] Alternatively, the complaint alleges that if the corporations' solicitations do not violate 2 U.S.C. § 441b, then that provision is unconstitutional either because it sanctions coerced political contributions in violation of the First Amendment or because it discriminates against unions in favor of corporations in violation of the Fifth Amendment, by allow-

PRELIMINARY LEGAL ANALYSIS

A. *Introduction*

Complainants' argument that corporate solicitations of non-unionized employees for contributions to separate segregated funds are inherently coercive, resulting in non-voluntary "contributions," is based upon the following observations.

(1) Corporations solicit mid-level career employees who are not members of labor organizations or covered by contract;

(2) Solicitation of these employees is sometimes in person and sometimes by a supervisor and the anonymity of contributors is not protected;

(3) Solicited employees are not permitted to designate, either by party or by candidate, the ultimate recipient of their contributions to the separate segregated funds; contributions made by corporate separate segregated funds are not always to candidates of the same political party as the solicited employees, and are often to federal candidates running in other states than the state where the solicited employees reside; and it appears that corporate separate segregated funds are "orchestrating" the amounts of employee contributions;

(4) Few employees decline to contribute and their contributions are usually in amounts which the complainants describe as "beyond normal political giving."

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ing corporate solicitations of both stockholders and executive and administrative employees while limiting labor organizations' solicitations to members; or because it violates the First Amendment rights of stockholders by allowing corporate treasury funds to be used to establish and support separate segregated funds.

For reasons discussed, *infra*, the Office of General Counsel recommends that the Commission find no reason to believe that the corporate separate segregated funds may have violated the Act, 2 U.S.C. § 441b, since it appears that even assuming that the above factual allegations are true and accurate descriptions of corporate solicitations, they do not, standing alone, state a violation of the Act.

B. *Legal Framework*

Corporate contributions in connection with federal elections have been prohibited by federal statute since 1907.[4] In 1971, however, Congress enacted an exception to this ban on corporate (and labor organiza-

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[4] In 1907, Congress enacted the Tillman Act, 34 Stat. 864. This law prohibited corporations from making "money contributions" in connection with federal elections. In 1925 the Tillman Act was expanded to include all contributions and was incorporated into the Federal Corrupt Practices Act, 43 Stat. 1070. In 1943 the prohibitions were temporarily extended to labor organizations by the War Labor Disputes Act, 57 Stat. 163. Congress permanently extended the statutory provisions to labor organizations by the Labor Management Relations Act (Taft-Hartley) of 1947, 61 Stat. 159, and broadened the prohibition to include expenditures as well as contributions. In 1948, the prohibition was re-enacted, without substantive change, as 18 U.S.C. § 610, 62 Stat. 723. The Federal Election Campaign Act of 1971, 86 Stat. 3, added a number of subsections to 18 U.S.C. § 610, and the 1976 FECA amendments, 90 Stat. 475, amended and recodified the provision as 2 U.S.C. § 441b. The history of 18 U.S.C. § 610 prior to its amendment by section 205 of FECA of 1971 is set forth in *United States* v. *International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352 U.S. 567 (1957). The history of the 1971 amendments is discussed in some detail in *Pipefitters Local No. 562* v. *United States*, 407 U.S. 385 (1972).

tions') contributions allowing general treasury funds to be used to establish and support a "separate segregated fund for political purposes." Now codified at 2 U.S.C. § 441b(b)(2)(C).

These separate segregated funds of corporations are permitted to solicit contributions from their stockholders, executive and administrative personnel, and their families. 2 U.S.C. § 441b(b)(4)(A)(i). However, the Act sets out three requirements for the solicitation of contributions from employees. 2 U.S.C. § 441b(b)(3) states:

> (3) It shall be unlawful—
>
> (A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction;
>
> (B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and
>
> (C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

Sections (B) and (C), in large part, codify the Supreme Court's concern that contributions to separate segregated funds be "knowing, free choice donations." *Pipefitters Local No. 562* v. *United States*,

407 U.S. 385, 414 (1972) (hereinafter "*Pipefiitters*"). In the opinion, the court stated that the determinative factor in complying with the "knowing, free choice" standard is "whether the solicitation scheme is designed to inform the individual solicited of the political nature of the fund and his freedom to refuse [support]" *Pipefiitters* at 415. The Court also interpreted 2 U.S.C. § 441b(b)(3)(A) to encompass apparent as well as actual threats and effective as well as actual dues or assessments. *Pipefitters* at 427. The allegations made in the instant complaint, therefore, should be analyzed within the framework of the Supreme Court's interpretation of 2 U.S.C. § 441b (b)(3)(A).

As the following discussion will show, none of the complainants' observations evidence unlawful solicitations by corporations to their separate segregated funds. Rather, the analysis of the observations reveals that corporate separate segregated funds are operating within the limits of the Act as interpreted by the Supreme Court in *Pipefitters*.

C. *Analysis of Allegations*

In order to facilitate the analysis of the allegations in this complaint, each will be discussed separately.

(1) Corporations solicit mid-level career employees who are not members of labor organizations or covered by contract;

Complainants allege that the solicitation of mid-level career employees evidence inherent coercion in that

> Such employees are totally dependent on the good will of the corporation for promotion, raises, and

> continued employment security. In this situation the desire to demonstrate loyalty and concern for the well-being of the corporation is strong incentive to respond to any contribution request.

Complaint, p. 16.

2 U.S.C. § 441b(b)(4)(A)(i) permits corporate separate segregated funds to solicit contributions from the corporation's "stockholders and their families and its executive or administrative personnel and their families."

It is not alleged that the employees are not "executive or administrative personnel." In fact, it is implicitly acknowledged that mid-level career employees are part of the administrative or executive group. Complaint, p. 32, n.15.

Since the Act clearly permits corporate separate segregated funds to solicit such employees the fact that they do so does not give rise to a possible violation of the Act. As long as the persons being solicited are proper solicitees, there is nothing in the Act or the regulations which would limit the separate segregated funds, lawful solicitation of those employees.[5] The separate segregated funds are free to solicit some, all, or none of their eligible solicitees.[6]

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[5] Of course, the separate segregated funds would be subject to the requirements of 2 U.S.C. § 441b(b)(3)(A), (B) and (C).

[6] The following discourse from the Senate debate on the 1976 amendments confirms the unlimited nature of such solicitation:

> Mr. CANNON. It does not make a limitation. So that a corporation, for example, or a separate segregated fund established by a corporation could solicit its stockholders and their families and its executive and admin-

(2) Solicitation of mid-level career employees is sometimes in person and sometimes by a supervisor and the anonymity of contributors is not protected;

Neither the Act and regulations nor the case law prohibit supervisor solicitation of subordinates. In fact, it appears to be implicitly permitted. The Supreme Court in *Pipefitters* stated:

> We hold, too, that although solicitation by union officials is permissible, such solicitation must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other [reprisal].

Pipefitters at 414.

In addition, Congress considered a provision prohibiting supervisor solicitation of a subordinate, but rejected its insertion.[7] Moreover, the Commission in its transmission of the proposed regulations to the Congress, has expressly approved the solicitation of subordinates by supervisors:

> It is the Commission's opinion that a supervisor may, subject to the requirement of this subsec-

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istrative personnel and their families at any time and in any fashion they saw fit.

Mr. PACKWOOD. And as many times as they want, to their hearts content?

Mr. CANNON. That is right. The same applies to a labor organization and its members and their families. . . .

122 Cong. Rec. 7894 (1976)

[7] The Senate version of the 1976 amendments included such a provision, but it was deleted in conference. 122 Cong. Rec. 7928 (1976).

tion, solicit a subordinate. This opinion is based on the decision in *Pipefitters* and the conferees rejection of the Senate bill which would have prohibited such solicitation.[8]

In the absence of allegations regarding coercive circumstances in which the supervisor's solicitation took place, such solicitations are contemplated by the Act, its legislative history and its interpretation by the Supreme Court.[9]

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[8] H.R. Doc. No. 95-44, 95th Cong. 1st Sess. 107. (1977). Complainants specifically allege that Justin Dart, the Chief Executive of Dart Industries, solicits employees. However, no circumstances surrounding his solicitations are alleged. The Wall Street Journal article from which the allegation is drawn, states: "Mr. Dart raises money for his company's political fund by writing personal letters to his executives. 'If they don't give, they get a sell' ". *Wall Street Journal*, August 15, 1978 at 1.

There could be circumstances in which a supervisor's solicitation of a subordinate was coercive. However, in and of itself, such a solicitation would not be coercive within the meaning of the Act.

[9] Congressman Hansen's comments regarding the provision which became 2 U.S.C. § 441b(b)(3)(A) underscore the concern of possible coercion resulting from such solicitations, noting, however, that the *mental reaction of the solicitee could not be controlled.* "The essential prerequisite for the validity of such political funds is that the contributions to them be voluntary. For that reason the final section of this amendment makes it a violation of section 610 to use physical force, job discrimination, financial reprisals or the threat thereof, in seeking contributions. This is intended to insure that a solicitor for COPE or BIPAC cannot abuse his organizational authority in seeking political contributions. Of course, *nothing can completely erase some residual effects on this score, any more than the law can control the mental reaction of a*

The lack of anonymity provided to contributors and non-contributors poses somewhat different considerations than those of supervisor solicitations. The problem of contributor identification was recognized by Congress [10] as having possible coercive effects and resulted in the enactment of 2 U.S.C. § 441b(b)(4)(B) which requires provisions for the anonymity of contributions in amounts of $50 or less. Congress's concern, however, was focused on the twice-yearly cross-solicitations, *i.e.*, solicitation by corporations of labor organization members and by labor organizations of corporate employees and stockholders, and did not touch on the unlimited permissible solicitations by unions of their members and by corporations of their stockholders and executive and administrative personnel. It is evident, therefore, that had Congress desired to insert a similar provision for general solicitations by corporation separate segregated funds of the corporation's stockholders and administrative and executive personnel, it presumably would have done so. Therefore, Congress, by negative implication, has not required separate segregated funds to provide for the anonymity of their contributors and non-contributors.[11] Even if the Commission should determine

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businessman asked for a contribution by an individual who happens to be his banker, or of a farmer approached by the head of his local farm organization. The proper approach, and the one adopted here, is to provide the strong assurance that a refusal, to contribute will not lead to reprisals and to leave the rest to the independence and good sense of each individual." 117 Cong. Rec. 43381, (1971). (Emphasis added).

[10] 122 Cong. Rec. 7894-7896 (1976).

[11] The provision of the regulations, 11 C.F.R. § 114.5(k)(1), permitting payroll deduction, check-off plans or other plans which deduct contributions from the dividends or payroll

that the lack of anonymity could create a coercive climate, the record-keeping and reporting requirements of the Act 2 U.S.C. § 432 and § 434(b) would conflict with any proposed anonymity requirement.[12]

Although possibly mid-level career employees could feel some pressure from supervisor solicitations and the lack of anonymity, neither factor would, in the absence of otherwise coercive circumstances, constitute a violation of the solicitation requirements of the Act. The solicitation scheme as drafted by Congress and interpreted by the Supreme Court in *Pipefitters* clearly envisages solicitations by supervisors and does not require any provisions to be made for anonymity.

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checks of stockholders or executive or administrative personnel, further indicates that anonymity in the context of the unlimited solicitations of the stockholders and the executive and administrative personnel of corporations by their separate segregated funds, was not a concern. It is evident that such methods easily make accessible the names of those persons who contribute and those who do not. *See* H.R. Doc. 95-44, 95th Cong., 1st Sess. 110 (1977).

[12] Thus, in the context of the twice-yearly cross-solicitations, Congress was only able to insure the anonymity of contributions in amounts of $50 or less. Had Congress chosen to require such anonymity for the general solicitations, corporate separate segregated funds, by a process of elimination, would still have the knowledge of those who gave in amounts of $50 or less.

(3) Solicited employees are not permitted to designate, either by party or by candidate, the ultimate receipient of their contributions to the separate segregated funds; contributions made by corporate separate segregated funds are not always to candidates of the same political party as the solicited employees, and are often to federal candidates running in other states than the state where the solicited employees reside; and it appears that corporate separate segregated funds are "orchestrating" the amounts of employee contributions.

From these observations, complainants conclude that logically employees would not voluntarily contribute to candidates of a different party affiliation or to candidates outside their home jurisdictions, or in general to a separate segregated fund whose activities may support candidates or causes outside of their individual preference. Therefore, according to complainants, many of the contributions from employees must be the result of coercion by the corporations. Complainants, however, neglect a very possible interpretation of these observations. Although, these observations might be reasons for an employee not to contribute, (and complainants state that 30% do not), they might be the precise reasons why employees do contribute. The employee is certainly free to contribute to those candidates whom he/she supports, as an individual; he can also decide to support candidates through the separate segregated funds whom his corporation believes will support the interests which the corporation considers important.

Although the activities described above might constitute reasons for employees to or not to contribute, it is clear that these activities are a permissible ex-

ercise of the corporations' control over their separate segregated funds. The Supreme Court in *Pipefiitters* stated that

> [Such] a fund must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments.

Pipefitters at 414,

The court continued,

> Nowhere, however, has Congress required that the political organization be formally or functionally independent of union control or that union officials be barred from soliciting contributions or even determining how the monies raised will be spent.

Pipefitters at 415.

The Commission's regulations reflect the Supreme Court's opinion that a corporation is permitted to exercise control over its separate segregated fund. 11 C.F.R. § 114.5(d). In the explanation of that section, the Commission stated:

> A corporation, labor organization, membership organization, cooperative, or corporation without capital stock may direct the disbursement of the voluntary contributions to its separate segregated fund, including the determination of the candidates to whom the contributions are made. *Pipefitters* v. *U.S.*, *supra*, 407 U.S. at 425, 92 S.Ct. at 270.

H.R. Doc. 95-44, 95th Cong., 1st Sess., 108 (1977).

Pipefitters also supports the application of Commission Regulation 11 C.F.R. § 114.5(a)(2) permitting corporate establishment of guidelines for contributions so long as these guidelines are "merely suggestions" and individuals are "free to contribute more or less than the guidelines suggest." As noted, the complainants allege that "the corporations are regimenting and orchestrating the amounts of employee 'voluntary' donations". However, the statistics cited by complainants show that, although for some corporations contributions cluster around a range, there does not appear to be a set pattern or set amount to which contributions are held nor do any of the corporations appear to be enforcing any such contribution regimentation.[13]

The concern of the Congress and the Supreme Court was to insure that funds were the result of voluntary contributions. As long as the requirement of complete separation of funds was met, the separate segregated funds would be free to exercise total control over-the disposition of the funds. *Pipefitters* at 426.

These observations cited by the complainants indicate that the corporate separate segregated funds are operating in a fashion permitted by the Act. Whether there are reasons for an employee to contribute or not to contribute, they do not demonstrate in any way that those employees who do contribute, do so involuntarily. Corporate and labor control over the disposition of the funds contributed to their separate segregated funds was clearly contemplated by

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[13] For instance, 61% of General Electrics' itemized contributors, holding mid-level managerial and professional positions contributed in amounts within the range of $150-$300. 37% of those contributors contributed in amounts less than the range, while 3% contributed in amounts above it.

the Act, its legislative history, and judicial interpretation.

(4) *Few employees decline to contribute and their contributions are usually in amounts which the complainants describe as "beyond normal political giving."*

Complainants state that the contributions from the "mid-level career employees" are "entirely beyond normal political contributions." Complaint, p. 19. It is stated that the average itemized contribution by those employees to the separate segregated funds ranges from $116 to $338. Complaint, p. 20. This range of contributions is then compared to a "national average annual personal contribution" of $16. Complaint, p. 20. No basis for this $16 figure is provided.[14] In addition, the use of such a broad, all-encompassing statistic in comparison with the very specific and narrow statistic given for the mid-level corporate employees is simplistic, as it does not account, in any way, for the numerous factors, such as income and education level, which could explain different contribution levels. Moreover, as only contributions in excess of $100 need be itemized, 2 U.S.C. § 434(b)(2), it is neither significant nor surprising that the average itemized contribution is in excess of $100. Moreover, complainants do not provide any figure for an average contribution which would account for both itemized and unitemized contributions. Therefore, the comparison between the cited $16 average annual personal political contribution and the $110 to $338 average itemized separate segre-

[14] This $16 figure is suspect. It was obtained through a telephone conversation with a political fundraiser. Complaint, p. 19, n.11.

gated funds contribution does not yield any meaningful inference.[15]

Perhaps one observation asserted in the complaint which could be probative of coercive solicitation circumstances is the participation rate of employees in the separate segregated funds.[16] If the complaint demonstrated an extremely high rate of participation, this might be sufficient to warrant an investigation, although the statistics would not be determinative of inherent coercion.

Complainants do not cite response rate figures for four of the eleven PACs. Participation rate figures from the corporate officers and vice-presidents listed in Standard and Poor's 1978 Register are cited for Winn-Dixie (80%), Dart Industries (95%), Standard Oil of Indiana (85%), Union Camp (71%), and General Electric (78%). However, no participation rates are given for any of these companies' "unprotected mid-level career employees." Citing a Tykes

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[15] Even if the statistics were meaningful, and it was proven that mid-level career employees do contribute in amounts greater than "normal" contributions, complainants state no basis or rationale for their assertion that such a situation evidences coercive solicitations. In fact, mid-level career employees might be in the higher income brackets, which would enable them to contribute more.

Moreover, the $116 to $338 range of contributions cited is well within permissible contribution limits. 2 U.S.C. § 441a.

[16] Although statistics in and of themselves are not probative of coercion, they are useful evidence. Statistics for participation rates have been cited in both *Pipefitters* and *FEC* v. *NEA*, 457 F. Supp. 1102 (D.D.C. 1977) (Reverse check-off held illegal). In *Pipefitters*, a low participation rate was cited as evidencing the successful informing of union members that donations were not mandatory. *Pipefitters* at 418, n.30. In *FEC* v. *NEA* a high rate (91.5%) was cited as indicating unknowing participation. *FEC* v. *NEA*, *supra* at 1108.

Research Associates' survey, complainants state that 71% of Eaton Corporation's targeted "Incentive Compensation Managers" at various plant locations participated in the separate segregated funds. Again citing the Tykes' Research Associates' survey, Complainants submit statistics for United Technologies Corporation showing that participation by all eligible employees is 11%, while 95% of those corporate officers and vice-presidents listed in Standard and Poor's participate.[17]

From these statistics, complainants allege that the participation rate of all employees solicited is 70% or higher. Complaint, p. 21. As is evident from the statistics given for each corporate separate segregated fund involved, the 70% or higher figure is not substantiated. In fact, the only total figure of mid-level employees solicited is Eaton's 70% figure, which is from the group of targeted "Incentive Compensation Managers," while the other figures cited are for corporate officers and vice-presidents. Complainants presumably imply that the response rates for corporate officers and vice-presidents indicate a similar response rate for the mid-level group. However, the 11% participation rate for United Technologies, considered with its 95% participation rate among its corporate officers and vice-presidents would indicate that there is not necessarily such a correlation. In addition, the high rates for corporate officers, together with the 70% alleged rate for mid-level employees, seems to undercut complainants' assertion

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[17] The statistics state the total response rate for all eligible employees. It is not known whether the term "eligible employees" includes those solicited through twice-yearly cross-solicitations.

that mid-level employees are particularly susceptible to the inherent coercion of being solicited.

Moreover, assuming the 70% overall corporate PAC participation rate is accurate, it also means that 30% of all those solicited refuse to contribute. The fact that such a large number of mid-level career employees would refuse to contribute indicates that they were successfully informed of their right to refuse without reprisal. See *Pipefitters* at 418, n.30.

D. *Constitutional Issues*

If the Commission determines that the solicitation activities complained against are permissible under the Act, then complainants assert that the Act's provisions prohibiting contributions and expenditures by labor organizations, 2 U.S.C. § 441b(a), and permitting corporate financing of the operating costs of separate segregated funds, 2 U.S.C. § 441b(b)(2)(C) are unconstitutional. Complaint, p. 36-42.

The thrust of complainants' arguments in this regard seem to be that, by being able to solicit contributions from the mid-level career group, corporations are in reality, permitted to make direct contributions. Corporations, therefore, are given an unfair advantage over labor organizations and as such, the Act unconstitutionally discriminates against labor organizations. The provisions permitting corporate financing of the operating costs of a separate segregated fund would then, in turn, violate the constitutional rights of stockholders.

The provisions of 2 U.S.C. § 441b were carefully drawn in a parallel fashion to balance the interests and rights of corporations and labor organizations. Those activities permitted to corporations are also permitted to labor organizations *e.g.*, 2 U.S.C. § 441b(b)(5), while those activities prohibited for

corporations are also prohibited for labor organizations, *e.g.*, 2 U.S.C. § 441b(a).

With regard to the provision permitting the operating costs of separate segregated funds to be financed through corporate or labor organization treasury funds, the Congress was striking a balance between the group interest of the corporation or labor organization as a whole and the interests of stockholders or labor organization members as individuals. In carving out the exception permitting the financing of operating costs of separate segregated funds from corporate or labor organization treasuries, Congress determined that the group interests predominated. *Pipefitters*, at 430, n.42 As noted above, the provision was carefully drawn to apply equally to corporations and labor organizations.

Although courts have not ruled on the specific constitutional arguments raised by the complainants in this matter, they have upheld the constitutionality of the prohibitions on corporate and labor organization contributions and expenditures on numerous occasions. *United States* v. *Chestnut*, 533 F.2d 40, 51 n.12 (2d Cir. 1976), *cert. denied*, 429 U.S. 829 (1976); *United States* v. *Boyle*, 482 F.2d 755 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1076 (1973); *Pipefitters*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc* 434 F.2d 1127, *rev'd on other grounds*, 407 U.S. 385 (1972); *United States* v. *Lewis Food Co.*, 366 F.2d 710 (9th Cir. 1966), *rev'g*, 236 F. Supp. 504; *Federal Election Commission* v. *National Education Association*, 457 F. Supp. 1102 (D.D.C. 1978); *Federal Election Commission* v. *Weinstein*, 462 F. Supp. 243 (S.D.N.Y. 1978); *Schwartz* v. *Romnes*, 357 F. Supp. 30, 36 (S.D.N.Y. 1973), *rev'd*

on other grounds, 495 F.2d 844 (2d Cir. 1974); *United States* v. *Brewers' Association*, 239 F. 163 (W.D.Pa. 1916). Each of these courts has recognized that Congress has legitimate and constitutionally sufficient reasons to regulate the participation of corporate entities and labor organizations in connection with federal elections.

CONCLUSION

Complainants allege that the solicitation of mid-level career employees by corporate separate segregated funds is inherently coercive and thus, violative of 2 U.S.C. § 441b(b)(3)(A) which prohibits the use of involuntary contributions.

Essentially complainants' argument is to have the Commission construe the statute as requiring additional protection for a particular class of corporate employees—those executive and administrative personnel not in top-management, but at mid-level.

When Congress drafted the 1976 amendments to permit solicitation of these particular employees, it provided no such protection; indeed, the statute's disclosure requirements, the enactment of protections for lower level employees, and the conference rejection of a prohibition against supervisor solicitation support the conclusion that Congress did not intend to include such protection.

The Commission is, of course, charged with the responsibility of assuring that contributions to separate segregated funds are, in fact, voluntary. The Supreme Court has made clear that that protection has underlying constitutional dimensions, for the right to abstain from giving, and to have a meaningful opportunity to abstain without having to justify that position. *See Pipefitters'*; *Abood* v. *Detroit Board*

of Education, 431 U.S. 209 (1977). The Commission's responsibility to assure that contributions to separate segregated funds are voluntary certainly permits it, by general regulation, to prohibit systems of collection which infringe on those rights. *See e.g.* 11 C.F.R. § 114.5(a)(1).

However, complainants are not alleging that a particular system of solicitation is coercive, but rather that the act of solicitation of corporate mid-level career employees is inherently coercive. Under the statutory scheme, legislative history and judicial interpretation, all the activities which complainants allege evidence coercive solicitations are permissible. In essence, complainants would have the Commission interpret the statute in a manner which would seem to be beyond the Commission's power. Without explicit statutory or regulatory changes, the Commission should conclude that there is no reason to believe the Act has been violated by the practices charged.

Recommendation

1. Find no reason to believe respondents have violated the Act.

2. Close the file.

Attachments
Complaint
Memorandum submitted by respondent
Letters

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Petitioner's Reply Brief

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No. 81-1684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Plaintiffs-Petitioners,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The Opposition makes no attempt to respond to petitioners' stated reason for granting the writ (Pet., p. 21) —the vast importance to our political system of the seminal federal question here presented. If corporations are permitted to pressure their one million career employees for contributions to corporate PACs by the coercive methods here in issue, then the face of American politics will be drastically altered. The unleashing of corporate political power built on the backs of vulnerable corporate employees is a new and dangerous erosion of the long-cherished liberties of political choice and political abstention. Unless this Court grants review, that erosion will take hold without any reasoned consideration by any

agency or court in the land. The Federal Election Commission dismissed petitioners' complaint without any investigation of the facts and without addressing the liberty-eroding impact of its refusal to act. The District Court then stated that "as a trier of fact, the Court might well draw the conclusion plaintiffs advance," yet refused to upset the Commission's inaction. Finally, the Court of Appeals affirmed summarily. Thus only this Court's review can bring a reasoned and considered opinion to bear upon so important an issue in American political life.[1]

Not only does the Opposition fail to challenge the importance of the seminal issue presented, it also fails to answer our three central grounds of attack upon the Commission's entirely permissive statutory construction concerning employer solicitation of vulnerable career employees. First, in a situation already pregnant with coercion, corporations are exploiting their employment authority to pressure employees' political donations. Second, major constitutional doubts arise if, through the PAC exception to the statute's ban on corporate election contributions, employees have become subjected to the em-

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[1] This Court recently granted a writ of certiorari to consider the related issue presented in No. 81-1506, *Federal Election Commission* v. *National Right to Work Committee.* The Congressional amendments of 1971 and 1976 to the long-standing ban on corporate and union political contributions and expenditures in federal elections provide a symmetrical scheme in which stock corporations are permitted to solicit their stockholders and their executive and administrative employees, non-stock corporations are permitted to solicit their members, and unions are likewise permitted to solicit their members. That symmetry is totally upset by the permissive statutory construction of the Court of Appeals in both *National Right to Work Committee* and the case at bar. Authorizing stock corporations to pressure their employees for contributions, like authorizing non-stock corporations to solicit persons without the usual member relationship, both "in effect attack . . . the general proscription on corporate spending itself." *Federal Election Commission* v. *National Right to Work Committee, supra,* Pet. at 47a.

ployers' pressure to surrender their right to be free from coerced political exaction. Third, to avoid the resulting constitutional doubts, all that is required is application of this Court's *Pipefitters* gloss barring PAC solicitation under "circumstances inherently coercive"—a judicial gloss which Congress can be presumed to have continued in effect in the 1976 amendments here in issue.

1. *The political solicitation methods here challenged as unlawful constitute exploitation of employee vulnerability by coercive employer pressures.* This Court in *Letter Carriers* (see Pet., p. 24) emphasized the plain and simple fact that political solicitation of employees by their employer is inherently coercive because by "express or tacit invitation" employees may be induced to give political support "in order to curry favor with their superiors rather than act out their own beliefs." Nowhere does the Opposition deign even to note this Court's *Letter Carriers* decision concerning the inherent dangers of employee solicitation—an omission probably explained (see Pet., p. 23) by the Commission's own recognition in 1975 of the "potential for coercion which is inherent in the employment relationship and which may be triggered by solicitation of employees by or on behalf of an employer."

Nor does the Commission anywhere respond to our demonstration that the corporate solicitation practices here challenged as unlawful are plainly exploiting the employment relationship. In a situation already pregnant with coercion, when a career employee is urged to pay political funds to the corporation which controls his economic prospects and promotion opportunities, the danger of coercion becomes a virtual certainty. Surely it is the employees' vulnerability that is exploited when the most senior Dart Corporation officers call non-contributors individually and give them a "sell" on financial participation in the PAC. Plainly it is exploitation of their vulnerability when the six hundred top employees of

Eaton Corporation are summoned to solicitation meetings and told to "get into politics or get out of business." Plainly it is exploiting the employment relationship when United Technologies calls employees together at small group meetings and tells them that they should support the political fund in order to "advance the interests of the industries and types of businesses" which the company pursues. Surely it is exploitation of employee vulnerability when Winn-Dixie supervisors place personal solicitation letters in the envelopes containing employees' annual bonuses and then personally deliver them to their employees. In the words of this Court in *Letter Carriers*, this is an "express or tacit invitation" which maximizes the risk that employees will contribute to politics "in order to curry favor with their superiors rather than act out their own beliefs." As confessed by the Treasurer of the Dart political fund, "we create a need for an individual to become a political activist . . . some will become contributors, not because of the purpose of the PAC, but because they feel a need to be part of the group."

2. *Major constitutional doubts arise if employees can be subjected to employer pressures for political payments under the PAC exception to the statute's ban on corporate election contributions.* If the statute authorizes the coercive solicitation methods here challenged, then government has become implicated in their use. Indeed (as Winn-Dixie candidly tells their employees in solicitation materials (Pet., p. 19)), it is only *because of* the statute's ban on corporate election contributions and its employee contribution exception that since 1976 corporations have turned to their career employees for building political treasuries. It is the 1971 PAC exception to the historic ban on corporate participation in federal elections, and Congress' authorization of employee PAC solicitations in 1976, that has fostered the dramatic growth of corporate PACs in the last six years (see Pet., p. 5).

Since it is the statute's ban on corporate federal election contributions and its employee solicitation exception to that

ban that is causing employees to be subjected to employer pressures for political donations, government cannot evade the constitutional consequences of the means employed. Though the solicitation of the employee is by a private corporation, it is an act undertaken because of the scheme of federal prohibition and exception and thus constitutional safeguards are applicable. Cf. *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961); *Railway Employees' Department* v. *Hanson*, 351 U.S. 225 (1956); *Evans* v. *Newton*, 382 U.S. 296 (1966). Thus, if the statute indeed authorizes employer exploitation of the employment relationship as a means of obtaining political payments, major constitutional doubts arise about the statute's validity. While we respectfully disagree with the recent ruling of the Court of Appeals that the Constitution permits that result (see Opp., p. 9), we believe the principal vice of the lower court's rulings is in its having reached the constitutional issue at all instead of adopting a statutory construction that avoids the need for its resolution.[2]

3. *Avoidance of the serious constitutional issue otherwise presented only requires application of this Court's* Pipefitters *gloss, barring PAC solicitations under "circumstances inherently coercive."* The 1972 statutory construction in *Pipefitters* was nowhere disapproved by

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[2] Analyzing only the amounts of the corporate employee donations and disregarding the solicitation pressures employed to obtain these payments, the Court of Appeals has declined to find that the solicitation means now employed by corporations "inevitably force career employees to compromise their political beliefs." But in this sensitive area, that is far too strict a standard, for what is crucial is the employees' *vulnerability* (recognized in *Letter Carriers*) and the liberty-eroding *impact* of inherently coercive solicitation methods (recognized in *Pipefitters*). Moreover, the lower court's constitutional ruling, on which we have noted an appeal, places plaintiffs in a Catch 22 position when first the Court declines to afford them an FEC investigation of the facts and next it finds the facts insufficiently established.

the Congress in the course of the 1976 Amendments, which opened the door to solicitation of employees by their corporate employers. Since at that time the statute's provision authorizing "voluntary" PAC funds had already been construed by this Court to bar inherently coercive means of solicitation, it requires no strain of the legislative text or intent to apply the *Pipefitters* rule here and avoid the serious constitutional issue otherwise presented. That issue can be avoided, and the political self-determination of a million corporate career employees safeguarded, simply by application to corporate employer solicitation of the statutory gloss already approved by this Court in *Pipefitters* as concerns labor union solicitation for a PAC.

Yet, remarkably, the Opposition nowhere responds to the *Pipefitters* gloss upon which our Petition is chiefly predicated. Instead, the Commission makes an argument that would *impugn* this Court's *Pipefitters* conclusion. The Commission argues (Opp., pp. 6-7) that the statute expressly bars retaliation against an employee who fails to contribute, and that this must be deemed the outer limit of the employee's protection under the law. But if that is true today, it was *equally true* in 1972 when the statute contained the same "no retaliation" clause (see 86 Stat. 10, cited 407 U.S. at 409-10) and yet *Pipefitters* construed the law to go further, barring "inherently coercive" means of political solicitation.

Nor can the force of *Pipefitters* and of the constitutional considerations be overcome by the Commission's assertion of administrative "expertise." Here the Commission has not purported to exercise any special expertise in statutory construction, but has instead indulged in a literalism that runs squarely into *Pipefitters* and creates a serious constitutional issue. Deference to the agency is as inappropriate here as it was recently when this Court rejected an "expert" statutory construction by the National Labor Relations Board that had created a

similarly serious constitutional question. *National Labor Relations Board* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Moreover, administrative agency constructions must be rejected if they "are inconsistent with the statutory mandate" or "frustrate the policy that Congress sought to implement," because "the courts are the final authorities on issues of statutory construction." *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, —— U.S. ——, 102 S.Ct. 38, 42 (1981).

Here the Commission's construction is contrary to that adopted by this Court in *Pipefitters*. In the present case the ban on inherently coercive solicitation methods follows, as it did in *Pipefitters*, from a reasonable construction of the conditions that make political contributions "voluntary" and from the constitutional doubts otherwise arising. To preserve First Amendment liberties this Court under far more difficult circumstances has adopted liberty-preserving constructions of federal statutes. See, e.g., *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961); *United States* v. *Seeger*, 380 U.S. 163 (1965); *United States* v. *CIO*, 335 U.S. 106 (1948).[3]

Since the relationship between the corporation and the career employee is far more pregnant with coercive potential than in the case of labor union solicitations of members, there is every reason for at least equal application of the safeguard prescribed in *Pipefitters*. Under these circumstances we continue to urge that employer solicitation methods that pressure political tribute from vulnerable career employees—a new and troubling departure in American political life—require this Court's plenary

[3] The Commission's reference to its expertise is the more misplaced here, where it is petitioners who have at all times sought to invoke the FEC's expertise through a Commission investigation of their complaint. It is the Commission which has declined to exercise any expertise, refusing even to commence an investigation of the facts concerning the means corporations are using to solicit their employees and the effects of those means upon freedom of political abstention.

review. Such review, and a remand for a full FEC investigation of the facts, can assure that the commendable purposes of the federal election law are implemented without needless sacrifice of cherished political liberties.

Respectfully submitted,

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